Supreme Court, U.S.
FILED
DEC - 7 1999

No. 99 971

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN CHERNA,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 6, 1999

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14388

QUESTIONS PRESENTED

On May 20, 1997, Agents of the Federal Bureau of Investigation conducted a search of Petitioner's residence/business. The search was conducted pursuant to an "all records" search warrant that authorized the agents to seize all "records and items related to Fraud by Wire and Mail Fraud as described" in the unattached affidavit of FBI Agent Loretta Smitherman. *App. 33a.* Pretermitting the question whether the warrant complied with the requirements of the Fourth Amendment, the Fifth Circuit concluded that, from an objective viewpoint, the officers had acted in good faith reliance on the warrant in seizing items at Petitioner's home. Accordingly, on the basis of the principles announced by this Court in *United States v. Leon*, it upheld the district court's denial of Petitioner's motion to suppress the evidence seized pursuant to the warrant. Petitioner raises the following questions:

I. WHEN IS A WARRANT SO FACIALLY DEFECTIVE THAT IT VITIATES THE GOVERNMENT'S CONTENTION THAT ITEMS SEIZED PURSUANT TO THE WARRANT ARE SHIELDED FROM SUPPRESSION BY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE?

II. DOES THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLY WHEN A SEARCH WARRANT EXPRESSLY ALLOWS THE EXECUTING OFFICERS TO SEIZE ANY ITEM OR RECORD WHICH THEY, IN THEIR DISCRETION, DETERMINE TO BE RELATED TO A SCHEME INVOLVING MAIL FRAUD OR WIRE FRAUD?

III. ASSUMING, ARGUENDO, THAT A SEARCH WARRANT'S LACK OF CONSTITUTIONAL PARTICULARITY COULD HAVE BEEN CURED BY ATTACHING AN AFFIDAVIT TO THE WARRANT, CAN OFFICERS EXECUTING THE WARRANT RELY ON THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHEN THE CURATIVE AFFIDAVIT WAS NEITHER PHYSICALLY ATTACHED TO THE WARRANT NOR SERVED WITH THE WARRANT AT THE TIME OF THE SEARCH?

IV. CAN THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE BE INVOKED TO DEFEAT SUPPRESSION WHEN THE GOVERNMENT ADMITS THAT IT DELIBERATELY INCORPORATED LANGUAGE IN THE WARRANT FOR THE PURPOSE OF GIVING THE EXECUTING OFFICERS ABSOLUTE DISCRETION TO DETERMINE WHAT ITEMS SHOULD BE SEIZED?

V. CAN A SO-CALLED "ALL RECORDS WARRANT" BE CONSISTENT WITH THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT WHEN IT IS IMPOSSIBLE TO CONCEIVE OF A SINGLE ITEM THAT MIGHT FALL OUTSIDE THE SCOPE OF THE WARRANT?

VI. WHAT TYPE OF SHOWING IS REQUIRED TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF AN "ALL RECORDS WARRANT"?

PARTIES TO THE PROCEEDING

Petitioner is Marvin B. Cherna. Petitioner is an individual with no corporate affiliations.

Respondent is the United States.

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Petitioner, Marvin B. Cherna, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 184 F.3d 403.

BASIS FOR THIS COURT'S JURISDICTION

This Petition requests that the Court exercise its discretionary power of certiorari to review a final judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 4, 1999. *App.1a-27a.* Petitioner filed a timely Petition For Rehearing in the Fifth Circuit; it was denied pursuant to an order entered on September 8, 1999. *App. 28a.* This Petition is being filed within ninety days of the date of the denial of the Petition for Rehearing, and, accordingly, is timely under Rule 13.3 of the Supreme Court Rules.

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. §3231. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1) and Rules 13.1 and 13.3 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

1. **Fourth Amendment To The Constitution Of The United States:**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner Marvin Cherna was the Executive Director of two charities - Help Hospitalized Childrens Fund and American Veterans Relief Fund (collectively, the "Charities"). Both Charities were operated out of Petitioner's home at 7610 Meadow Oaks Drive in Dallas, Texas. *App. 2a.*

The Application And Supporting Affidavit For Search Warrant:

On or about May 19, 1997, FBI Agent Loretta Smitherman filed an application and supporting affidavit under seal seeking the issuance of a warrant authorizing a comprehensive search of Petitioner's home for the purpose of seizing "items and records" relating to mail fraud and wire fraud. In her affidavit, Agent Smitherman asserted that Cherna had regularly misappropriated funds donated to the Charities by converting them to his personal use. Agent Smitherman's Affidavit also contained her conclusion that Petitioner's fraudulent conduct was so extensive that it was possible to say that his "entire life was consumed by fraud." *App. 55a.* On the basis of that conclusion, Agent Smitherman requested the issuance of what she termed an "all documents warrant", meaning one that places no restriction on the nature of any records or documents subject to seizure. *App. 54a-55a.*[1] Indeed, Agent Smitherman's affidavit candidly informed the Magistrate that she anticipated that *all documents and records* on the premises would constitute evidence:

> "I believe that all documents and records at the premises to be searched are likely to constitute evidence, either by directly showing the HHCF and AVRF scheme or by showing how CHERNA personally obtained and spent the fraudulently obtained money for his personal expenses." *App. 55a.*

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[1] Agent Smitherman testified at the suppression hearing that the alleged misappropriation of funds was one of the reasons she "felt it necessary to have what's called an all records search at his home." *App. 63a.*

Aside from its general reference to all documents and records (and the storage cabinets and files in which they were contained), the Smitherman Affidavit specifically identified only one other category of evidence that Agent Smitherman sought authority to seize - computer hardware and software:

> "I know that potential damage sometimes occurs if data of evidentiary value is removed from the computer on which the data is maintained. Downloading of the data can also be a time consuming technical process. I request authority to seize any computer equipment and software which are found within the subject premises." *App. 54a.*

The Search Warrant:

Acting solely on the basis of the allegations contained in the Smitherman Affidavit[2], Magistrate Judge John B. Tolle issued the requested all records search warrant. *App. 30a-36a* (the "Warrant"). The description of the items the officers were authorized to seize was set out in Attachment B to the Warrant. *App. 33a-36a.* As evidenced by the unrestrained scope of the following introductory paragraph, Attachment B placed only one limitation on the nature of the items to be seized on the premises - that they be "related to" mail fraud and wire fraud as described in the Smitherman Affidavit:

> "Records and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman, within the premises 7610 Meadow Oaks Drive, Dallas, Texas, *including, but not limited to the following,* however maintained: [emphasis added][3]

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[2] Agent Smitherman acknowledged that her affidavit was the only evidence presented to Judge Tolle. *App. 71a-72a.*

[3] Agent Smitherman was very candid in explaining that this language was intentionally designed to give the executing officers discretion to seize any items on the scene:

Q. Doesn't that provide you with the discretion to determine precisely what relates to mail fraud or wire fraud?

Immediately following this lead-in paragraph were 26 separate paragraphs broadly describing various categories of records and items subject to seizure. Many of the separately numbered paragraphs themselves contained broad, sweeping language. Paragraph 1, for example, authorized the seizure of "'Help the [sic] Hospitalized Children's Fund' (HHCF) and 'American Veterans' Relief Fund' (AVRF) business records and documents *including, but not limited to. . .*" (emphasis added). *App. 33a.* Further, several of the individual paragraphs were punctuated with the ambiguous "etc." Paragraph 4, for example, authorized the seizure of all documentation "relating to all for-profit and non-profit organizations, corporations, businesses, etc." in which Petitioner was associated or in which he had an ownership interest.[4] *App. 34a.* Paragraph 26 allowed the seizure of

> "Receipts of [sic] other documentation of the purchase of items of value, such as jewelry, electronic equipment vacations packages, automobiles, etc. indicative that CHERNA spent the money he fraudulently obtained on personal expenses and personal items." (emphasis added). *App. 36a.*

The Warrant offered no explanation as to how the agents were supposed to determine which "items of value" were purchased with the proceeds of "fraudulently obtained" funds. In essence, paragraph 26 of the Warrant allowed the executing officers to presume that every document reflecting Cherna's purchase of any item constituted evidence that Cherna "obtained money

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A. Yes. In case I neglected to put something in [sic] important on the list and I found an important piece of evidence, I wouldn't want to be precluded from being able to seize it.
Q. Exercise discretion on site to seize that item?
A. Yes. *App. 93a.*

[4] The Government never explained how documents pertaining to Petitioner's association with or ownership interest in corporations or businesses other than HHCF and AVRF had any relevance to the wire fraud and mail fraud allegations set out in the Smitherman Affidavit.

fraudulently" and spent it on himself. Similar open-ended uses of "etc." were contained in paragraphs 5, 10 and 25.

The Warrant did not contain any date restrictions or other limiting characteristics designed to narrow the range of the documents or items subject to seizure. Agent Smitherman explained that "it didn't occur to me to restrict the date" and that the Assistant United States Attorney she conferred with "didn't bring it up." *App. 88a.*

The Search:

The Warrant was executed by a team comprised of six FBI Agents. In addition to the agents, there were at least four additional FBI employees on site:

> Q. . . . Were there other people that were out there to do technical things, administrative duties to assist the agents?
> A. Yes. We had a photographer there, we had two financial analysts who were in charge of entering evidence into a computer database inventorying [sic]. And then there was an investigative accountant there who helped load up the truck and move the boxes." *App. 63a-64a.*

Although the agents who participated in the search had apparently read the Smitherman Affidavit, Agent Smitherman conceded that she did not know whether the other FBI personnel assisting the agents had done the same. She explained that the non-agent personnel "weren't going to be participating in seizing evidence", and, therefore, she did not instruct them to read it:[5]

> Q. You testified on direct, Agent Smitherman, that there were a number of additional individuals in addition to agents who were on site -

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[5] It is difficult to reconcile Ms. Smitherman's characterization of the role of the non-agents with her above-quoted description of the various functions that the non-agent personnel performed during the course of the search and seizure. The non-agents were clearly involved in seizing evidence.

A. Yes.
Q. --who were assisting in and executing the search. Did they read the affidavit and search warrant?
A. I don't know because they didn't -they weren't going to be participating in seizing evidence, so I didn't - I didn't instruct them to read it. They may have read it. *App. 95a.*

The record is clear that the Smitherman Affidavit, although referenced in the body of the Warrant, was neither attached to the Warrant, nor served with the Warrant:

Q. Agent Smitherman, the application and affidavit for search warrant, I want to make sure we're clear on this, was never shown to, served upon or left with the defendant, Marvin Cherna. Is that correct?
A. The application for search warrant?[6]
Q. And the affidavit.
A. That's right.
Q. So he never saw the affidavit. All he saw was the search warrant and attachments A and B to the search warrant, correct?
A. Yes, that's correct. *App. 72a-73a.*[7]

The Warrant conclusively establishes that the Government was aware that the premises located at 7610 Meadow Oaks served as both Cherna's personal residence and his place of business. *App. 32a.* Moreover, Agent Smitherman testified that she had been told, prior to the search, that the front two rooms of the premises served as office space, and that the rest was Petitioner's personal residence. Indeed, Agent Smitherman represented in her affidavit that "to the extent practicable but so as not to limit the court's authorized search, I intend to search only the part of the premises apparently and obviously designated and used by CHERNA to conduct his business." *App. 54a.*

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[6] Agent Smitherman had a copy of the affidavit in her car at the time the search was conducted *(App. 95a),* but did not show it to Petitioner.

[7] Agent Smitherman explained that the affidavit was under seal and, thus, was not served on Mr. Cherna. *App. 73a.*

After entering the premises, Agent Smitherman observed that the Charities appeared to be operating out of four rooms and the garage:

> "there were actually four rooms in the residence that were used as office space and the garage had also been converted into a telemarketing room and a storage room of records." *App. 74a.*

She acknowledged, however, that the search went well beyond the area in which the Charities operated. Indeed, she conceded that "we searched everywhere", including parts of the house that were not obviously involved with the Charities [e.g. the bedroom, the kitchen and the living room]. *App. 75a.*

The Suppression Motion And Hearing:

Prior to trial, Petitioner filed a timely motion to suppress all evidence seized during the search. Petitioner argued, inter alia, that the Warrant was a general warrant totally lacking in particularity that, on its face, violated the Fourth Amendment.

After conducting a hearing, the district court denied Petitioner's motion to suppress, concluding that the Warrant was valid and, in any event, that the search and seizure had been carried out in good faith, making suppression inappropriate under *United States v. Leon* and its progeny. *App. 4a.* Petitioner then entered a conditional plea of guilty pursuant to *F.R.Crim. P.* 11(c), expressly reserving the suppression issues for appeal. *App. 4a.* Notwithstanding its ruling on the merits of Petitioner's motion, the district court concluded that the suppression issues raised by Petitioner were substantial enough to satisfy the requirements of 18 U.S.C. § 3143(b), and that Petitioner should therefore remain free pending appeal.

On appeal, the Fifth Circuit noted that it need not address the question whether the Warrant complied with the Constitution if it first concluded that the executing officers had conducted the search and seizure in "good faith." It then proceeded to hold that the record supported the district court's alternative holding that the FBI had conducted the search and seizure in good faith, and,

accordingly, that the evidence seized should not be suppressed. *App. 1a-23a.* Specifically, it found that (i) "[e]ven assuming that the absence of the affidavit rendered the warrant constitutionally defective, this defect could have been remedied with only minor corrections, such as the attachment of the affidavit. [citations omitted]." *App. 15a-16a;* (ii) that the non-attachment of the affidavit did not render "the warrant so obviously defective that the officers could not reasonably have relied on it" because a reasonable officer, "relying on the magistrate judge's issuance of the warrant and sealing of the affidavit, could have believed that the reference to the affidavit and the rather lengthy list that followed satisfied the Fourth Amendment's particularity requirement. [citations omitted]." *App. 17a;* (iii) the fact that Circuit precedent was unsettled on the question whether the affidavit had to "be physically attached to the warrant or served on the defendant" was enough to defeat the contention that the executing officers could not in good faith rely on the Warrant standing alone. *App. 17a*; and (iv) that Agent Smitherman's testimony regarding her intention in drafting the Warrant, while "sometimes equivocal", did not "establish that Smitherman intended to violate the Fourth Amendment."*App. 22a.*

REASONS FOR ALLOWING THE WRIT

As indicated above, the Fifth Circuit never addressed the question whether the Warrant was, in fact, valid under the Fourth Amendment. Instead, it relied on the good faith exception to the exclusionary rule to deny suppression of evidence seized pursuant to the Warrant.

Although this Court first recognized the good faith exception to the exclusionary rule in 1984, it has only discussed the exception in four of its cases. In the leading case, *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Court concluded that suppression of evidence seized pursuant to a warrant later declared invalid should not be automatic. Noting that the exclusionary rule was designed for the purpose of deterring police misconduct, the Court declared that the rule should not be applied

unless doing so would serve that purpose. Thus, the Court held that evidence seized by officers acting in objectively reasonable reliance on a subsequently invalidated search warrant would no longer be suppressed. *Leon*, 104 S.Ct. at 3421.

The *Leon* Court did, however, recognize four specific circumstances in which suppression would continue to be appropriate notwithstanding the fact that the search and seizure had been conducted under authority of a warrant. First, suppression would continue to be the rule if the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Second, suppression would be ordered if the issuing magistrate "wholly abandoned" his judicial role. Third, if the warrant was issued on the basis of an affidavit that was completely "lacking in indicia of probable cause", suppression would continue to be appropriate. Finally, the Court recognized that suppression must be ordered if the warrant itself was "so facially deficient" in failing to particularize the places to be searched and the items to be seized that no objectively reasonable officer would reasonably presume that it was valid. *Leon*, 104 S.Ct. at 3421.

On the same day it decided *Leon*, the Court decided a case in which it demonstrated the proper application of the rule announced in *Leon*. In *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424 (1984), a police officer drafted an affidavit seeking a warrant authorizing the seizure of specific items of evidence relevant to a murder case. The only warrant form available to the officer on the day in question was one that authorized the seizure of controlled substances. Significantly, the officer called the judge's attention to the fact that the warrant form would need to be modified. The judge expressly informed the officer that he would make the necessary changes to the warrant form. After making certain changes to the warrant, but failing to strike the warrant's references to "controlled substances," the judge "returned the affidavit and warrant to O'Malley, informing him that the warrant was sufficient authority in form and content to carry out the search as requested." *Sheppard*, 468 U.S. at 986, 104 S.Ct. at 3427. The executing officer then proceeded to conduct the search, limiting its

scope to the items specifically described in the affidavit. Applying *Leon*, the Court concluded that the good faith exception saved the fruits of the search from the exclusionary rule. Significantly, the Court emphasized that its holding was premised on the fact that the issuing judge had expressly assured Officer O'Malley that the warrant was in proper form: "We *hold only* that it was not unreasonable for the police in this case to *rely on* the *judge's assurances* that the warrant authorized the search they had requested." *Sheppard*, 104 S.Ct. at 3428, n. 6 [*emphasis added*].[8] In the courts below, Petitioner argued that three of the scenarios identified in *Leon* as situations in which the good faith exception does not apply were present in this case. Specifically, Petitioner asserted that (i) the warrant was facially defective because it was, on its face, an unconstitutional general warrant; (ii) the warrant was not supported by probable cause sufficient to justify the issuance of an "all records" warrant directed at Petitioner's home; and (iii) the Magistrate Judge had abdicated his authority by signing a warrant that granted the executing officers carte blanche to seize anything they happened to find in Petitioner's home. Petitioner will separately address each of these arguments below, and explain why he believes the Fifth Circuit was wrong in rejecting each of them.

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[8] Since 1984, the Court has discussed the good faith exception in only two other cases, neither of which has direct significance in the context of the case at bar. In *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160 (1987), the Court concluded that the good faith exception saved the fruits of a search carried out pursuant to a statute that was subsequently declared unconstitutional. In *Arizona v. Evans*, 514 U.S. 1 (1995), the arresting officers had arrested Evans in reliance on a police record indicating the existence of an outstanding arrest warrant. While being handcuffed, Evans dropped a hand rolled cigarette that smelled of marijuana. The officers then searched Evans' car and discovered a bag of marijuana under the seat. As it turned out, the police record indicating the existence of an outstanding warrant for Evans' arrest was inaccurate, apparently due to an error on the part of court personnel. The Court concluded that the policies underlying the good faith exception were applicable, and declined to suppress the evidence seized during the search incident to the illegal arrest.

Further, Petitioner will note the existence of at least two Circuit conflicts (and one intra-Circuit conflict) arising out of the various issues presented. Finally, Petitioner will demonstrate that the Fifth Circuit's ruling conflicts with this Court's reasoning in the *Sheppard* case.

I.

The Fifth Circuit's Construction Of The Good Faith Exception To the Exclusionary Rule Conflicts With The Rulings Of Other Circuits And With This Court's Prior Cases; The Circuit Conflict On The Issue Of When An Affidavit May Supply Particularity Should Be Resolved

Clearly, the Warrant's plain terms authorized a no-holds-barred search of Cherna's residence for all "records and items" that the executing officers, *in the exercise of their own discretion,* determined to be somehow "related to" mail fraud and wire fraud as described in the unattached Smitherman Affidavit. It was literally impossible for anyone (including the officers who executed the Warrant) to identify a single document or other item located at 7610 Meadow Oaks Drive that was *excluded* from the scope of the Warrant.

This fact was vividly illustrated at the hearing on the motion to suppress when Agent Smitherman was asked to identify a single item that might fall *outside* the scope of the Warrant. She considered the question for several minutes before finally replying that the Warrant did not permit or authorize the seizure of photographs of Petitioner's children or of religious materials. *App. 89a-93a.* Undermining her own claim, Agent Smitherman later conceded that the agents had, in fact, seized pictures of Petitioner's children during the course of the search:

> Q. Did you in fact seize photographs at 7610 Meadow Oaks Road?
> A. Yes, we did.
> Q. Were those some of the photographs of Mr. Cherna's children?

A. Yes. *App. 94a.*[9]

To protect citizens from unbounded searches like the one conducted here, the Fourth Amendment expressly requires that all search warrants describe with particularity the places to be searched and the items that are subject to seizure. *United States v. Shugart,* 117 F.3d 838, 844 (5th Cir. 1997). This particularity requirement prevents the government from using the device of a general warrant - a search warrant that is "open-ended" or "general" in scope - to conduct wide ranging exploratory searches into the private affairs of its citizens. *Ybarra v. Illinois,* 444 U.S. 90, 91, 100 S.Ct. 338, 342 n. 4(1979) (Fourth Amendment prohibits "'open-ended' or 'general' warrants."). In essence, the Fourth Amendment repudiates "these general warrants" by prohibiting the seizure of one thing under a warrant that describes another. *Berger v. State of New York,* 388 U.S. 41, 58, 87 S.Ct. 1873, 1883 (1967). Nothing is left to the discretion of the officers executing the warrant. *Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927) ("As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."). A warrant that amounts to "a roving commission to 'seize'" is simply incompatible with the Fourth Amendment's repudiation of the general warrant. *Berger,* 87 S.Ct. at 1883.

In Petitioner's case, the Warrant's broad grant authorizing agents to search and seize all "records and items" relating to the offenses of mail and wire fraud as described in Agent Smitherman's *unattached* affidavit, *"including, without limitation,"* the 26 broad categories of items and records generally described in the Warrant, is wholly lacking in particularity. That much has been recognized by other Circuits and by the Fifth Circuit itself:

> "The warrant's explicit authorization to the agents to seize 'business records including, but not limited to' those specifically identified subjected essentially all of ADM's records dated after June 1, 1984 to seizure and therefore

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[9] It is not clear why Agent Smitherman believed that religious articles would be excluded from the scope of the Warrant.

> the warrant, by itself, was not sufficiently particular." *United States v. Dale*, 991 F.2d 819, 846 (D.C. Cir. 1993).

See also, United States v. George, 975 F.2d 72 (2d Cir. 1992) (Warrant that contained catchall phrase authorizing search for specific items and "other evidence relating to the commission of a crime" was an unconstitutional general warrant); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 749-50 (9th Cir. 1989) (Warrant unconstitutionally broad where it allowed the seizure of "evidence of violations of federal criminal law including but not limited to "); *United States v. Barr*, 844 F.Supp. 1198, 1200 (M.D. Tenn. 1993) (Warrant held to be unconstitutional general warrant where it authorized search and seizure of "any documents which reasonably appear to relate to the offenses described in the attached affidavit."); *United States v. Shugart*, 117 F.3d at 845, n.6 (warrant lacked particularity where terms describing items to be seized were *"so* broad as to constitute the type of general warrant that has 'long been affirmed in the jurisprudence of both England and the United States.'"

The unconstitutional breadth of the Warrant is exacerbated in this case by the fact that both the Warrant and the Smitherman Affidavit reference the amorphous crimes of mail fraud and wire fraud. The Warrant itself was devoid of any explanation or description of the nature of the alleged fraudulent scheme. The Warrant simply referenced the crimes of mail fraud and wire fraud, and referred to the *missing* Smitherman Affidavit for details.[10] Several courts have held that a warrant's mere reference to the crimes of mail fraud and/or wire fraud does nothing to define the scope of a search warrant:

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[10] As described above, the Smitherman Affidavit would not have supplied the requisite particularity even, assuming, *arguendo*, that it had been attached to the Warrant or that it had "accompanied" the Warrant. Supra, p. 3. It did not circumscribe the scope of the search by limiting the nature of the items and records subject to seizure.

"First, the government contends that the language of the warrant limited the search to evidence of violations of 18 U.S.C. § 1341 and that this was sufficient particularity. However, section 1341 makes illegal all frauds that utilize the mails; limitation by so broad a statute is no limitation at all." *United States v. Roche*, 614 F.2d 6, 8 (lst Cir. 1980).

* * *

"The government also argues that the reference to 18 U.S.C. § 1343 in the incorporated description of the items to be seized sufficiently limited the scope of the warrant by restricting the search to business records that evidenced a scheme to commit wire fraud. Although a warrant's reference to a particular statute may in certain circumstances limit the scope of the warrant sufficiently to satisfy the particularity requirement, *see, e.g., In re Grand Jury Proceedings*, 716 F.2d 493, 499 (8th Cir. 1983), it will not do so where, as here, the warrant authorizes seizure of all records and where, as here, the reference is to a broad federal statute, such as the federal wire fraud statute. References to broad statutes realistically constitute no limitation at all on the scope of an otherwise overbroad warrant and therefore cannot save it."*U.S. v. Maxwell*, 920 F.2d 1028, 1033 (D.C. Cir. 1990)[footnote omitted].

See also, United States v. Leary, 846 F.2d 592, 601-602 (10th Cir. 1988) ("An unadorned reference to a broad federal statute does not sufficiently limit the scope of a search warrant. Absent other limiting factors, such a warrant does not comply with the requirements of the fourth amendment."); *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987) (Warrant's references to general conspiracy statute and general tax evasion statute did not cure particularity problem); *United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986) (Kennedy, J.) (Where "the only limit on the search and seizure was that the items seized be evidence of a violation of any one of thirteen statutes" warrant was held to be a general warrant); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982) ("The only limitation on the search and seizure of appellants' business papers was the requirement that they be the instrumentality

or evidence of violation of the general tax evasion statute 26 U.S.C. § 7201. That is not enough."). Thus, the Warrant was a no-holds barred license allowing the executing officers to search for and seize whatever they, in their absolute discretion, deemed to be of interest. The fact that it was an impermissible general warrant should have been apparent to any objectively reasonable law enforcement officer.

In the Fifth Circuit, the Government argued that the Warrant's reference to the Smitherman Affidavit supplied the requisite particularity.[11] It is clear that some Circuits would have flatly rejected the Government's attempt to rely on the Smitherman Affidavit. The Tenth Circuit, for example, has been steadfast in requiring that an affidavit referenced in the body of the warrant also be physically attached to the warrant if it is relied on to supply constitutional particularity. *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993) (affidavit could not cure particularity problem because, *inter alia*, there was no indication in the record that the affidavit had been "physically attached to the warrants."); *United States v. Leary*, 846 F.2d 592, 603 (10th Cir. 1988); *United States v. Medlin*, 798 F.2d 407, 410 n. 1 (10th Cir. 1986) ("When an affidavit is attached to a warrant and incorporated by reference into the warrant, it can be used to cure a lack of particularity. [citation omitted]. There is no evidence in this case, however, that the affidavit was attached to the warrant."). The Second Circuit has also endorsed the view that the affidavit must be attached to the warrant before it will be considered to cure a particularity problem. *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) ("Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it."). Indeed, as the Court below recognized, the Fifth Circuit itself has indicated that actual physical attachment of

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[11] The Government argued that the Warrant, "with its accompanying attachment *and* affidavit, was sufficiently detailed to particularize the agents' search." *Govt.'s Br., p. 18 (emphasis in original).*

the affidavit is a necessary prerequisite if the affidavit is to supply the requisite particularity:

> "If, as is the case here, the warrant is ambiguous, but fairly directs attention to the place actually searched, *and if the affidavit supporting the warrant is attached to the warrant when issued,* the affidavit may be considered to clarify an ambiguity on the face of the warrant. [citation omitted]. *The affidavit must be attached to the warrant so that the executing officer and the person whose premises are to be searched both have the information contained in the affidavit, in addition to what is said on the face of the warrant." United States v. Haydel,* 649 F.2d 1152 (5th Cir. 1981):[12] (emphasis added).

Other Circuits are less dogmatic about physical attachment, requiring only that the affidavit both *"accompany"* the warrant and be *"referenced"* in the warrant before it can be utilized to cure the warrant's particularity problem. *United States v. Johnson*, 690 F.2d 60, 64 (3rd Cir. 1982) ("When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant."); *U.S. v. Blakeney*, 942 F.2d 1001,1024 (6th Cir. 1991) ("A search warrant may be construed with reference to a supporting affidavit if the affidavit

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[12] In its more recent pronouncements on the question, the Fifth Circuit has been somewhat ambiguous in describing whether it follows the actual physical attachment standard or the "accompanied" test. In *United States v. Beaumont*, 972 F.2d 553, 561 (5th Cir. 1992), it quoted with approval the same language from *Haydel* that is quoted above, thereby suggesting that physical attachment is the standard. However, the *Beaumont* court also cited *United States v. Cook*, 657 F.2d 730, 736 (5th Cir. 1981), a case in which an affidavit was allowed to supplement the warrant even though it apparently was not physically attached to the warrant because the affidavit was "referred to" in the warrant and "accompanied" the warrant. As described above, it makes no difference which of the possible Fifth Circuit tests the Court applies in this case, for here the Smitherman Affidavit was not physically attached to the Warrant and did not "accompany" the Warrant. Accordingly, neither test is satisfied.

accompanies the warrant and the warrant incorporates the affidavit by reference."); *Application of Lafayette Academy, Inc.*, 610 F.2d 1, 4 (1st Cir. 1979) (affidavit not permitted to cure particularity problem where it was not served with the warrant and the warrant did not reference the affidavit), *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993) (affidavit need not be physically attached to the warrant as long as it is incorporated by reference into the warrant and "accompanied" the warrant at the time that the latter was authorized and executed). For example, in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), the Ninth Circuit, characterizing its rule as "well settled", explained that an affidavit may be referred to for purposes of "satisfying the particularity requirement" if two conditions are satisfied: "(1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein." *Id.* at 849.[13]

The cases that apply the "accompanying" standard raise an obvious issue: what conditions must be satisfied before it can be said that an affidavit "accompanies" the warrant? The Circuits that have adopted the *"accompanying"* standard require, at a minimum, that the affidavit be present at the search site and shown to the individuals who have an interest in the premises to be searched:

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[13] The Ninth Circuit authorities do not appear to be altogether consistent. Several cases suggest that actual physical attachment is a prerequisite to use of the affidavit. In *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), the court explained that an overly broad warrant can be cured "if the affidavit is 'attached to and incorporated by reference in' the warrant." *Id.* at 750 (quoting *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1989)). This rule was reiterated in *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989) ("We will not, however, rely on an affidavit to cure the generality of a warrant where the affidavit is not 'attached to and incorporated by reference' in the warrant."); *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982) (in order to cure a warrant's lack of specificity, the affidavit must be attached to and incorporated by reference in the warrant). In *Towne* and *McGrew*, however, the Ninth Circuit appears to have determined that an affidavit may be read with the warrant if it is incorporated into the warrant and merely "accompanies" the warrant.

> "Sufficient particularity may also be provided even if the affidavit is merely present at the search [citation omitted]. In any event, some measure must be taken not only to limit the discretion of the executing officer but also to inform the subjected person what the officers are entitled to take." *In the Matter of the Application of Lafayette Academy*, 610 F.2d 1, 5 (1st Cir. 1979) .

See also, Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987). Clearly, the facts here establish that the Smitherman Affidavit did not "accompany" the Warrant within the meaning of the above-quoted standard, for Petitioner was never shown a copy of the Warrant.

The *McGrew* scenario is perhaps most analogous to the case *sub judice*. In *McGrew*, the warrant referenced an "attached affidavit which is incorporated herein." *McGrew*, 122 F.3d at 849. However, as in Petitioner's case, the government openly admitted that the affidavit was under seal and, for that reason, had not been served on McGrew. The Government nevertheless argued that the Fourth Amendment's particularity requirement was satisfied because its agents were "aware of the contents of the affidavit listing the items they may seize." The *McGrew* Court flatly rejected the Government's contention. It pointed out that an affidavit that is not "served" (along with the warrant) on the person whose premises are searched cannot possibly inform that person of the nature of the items the executing officers are authorized to seize. *McGrew*, 122 F.3d at 848. Since one purpose of the particularity requirement is to inform the target of the search of the permissible scope of the search and any seizure, that purpose is not served if an affidavit incorporated into the warrant is never served on the person whose premises are subjected to the search. Thus, an affidavit that is referenced in the warrant, but is never served on the person whose property is searched, does not "accompany" the warrant and cannot be considered for purposes of the Fourth Amendment's particularity requirement.

In holding that the "good faith" exception applied even though Petitioner was never served with the Smitherman Affidavit,

the Fifth Circuit placed itself squarely in conflict with the Ninth Circuit's ruling in *McGrew, supra*. The Ninth Circuit, confronting the question whether the good faith exception applied in the context of a virtually identical fact scenario, reached precisely the opposite conclusion:

> "Furthermore, the 'good faith' exception to the exclusionary rule is not available in this instance. In order to avoid the effect of the exclusionary rule, there must be an 'objective reasonable basis for the mistaken belief that the warrant was valid.' [citation omitted]. If the 'incorporated affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents." [citations omitted]. *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997).

Moreover, the *McGrew* Court made it clear that by "accompany" it meant more than the mere fact that the executing officers were aware of the contents of the affidavit. In the *McGrew* Court's view, the good faith exception did not apply even though the officers were aware of the contents of the affidavit if the person being searched "is still completely unaided when agents fail to produce a document explaining the parameters of the search." *McGrew*, 122 F.3d at 850, n. 5.

II.

This Court Has Never Considered Whether An "All Records Warrant" Is Constitutional, And, If So, The Standard Of Probable Cause That Must Be Satisfied Before Such A Warrant May Issue

As described above, this Warrant literally subjected Petitioner's entire home to a search, and every tangible item in his home to seizure. The Warrant's sole requirement was that the executing agents (not the magistrate) reach the subjective conclusion that any item they seized was somehow "related to" mail fraud or wire fraud.

Virtually all of the Circuits have discussed the standard of probable cause must be satisfied to justify issuance of an "all

records" warrant. Several of them have embraced the so-called "permeated with fraud" doctrine. This doctrine accepts the notion that a warrant may issue allowing a search for and seizure of all records located at the place where a business is located if the evidence shows that the business in question is "permeated with fraud." *United States v. Sawyer*, 799 F.2d 1494, 1508 (11th Cir. 1986) (". . . in cases involving a pervasive scheme to defraud, all the business records of an enterprise may be seized."); *United States Postal Service v. C.E.C. Services*, 869 F.2d 184, 187 (2d Cir. 1989); *United States v. Oloyede*, 982 F.2d 133, 139-140 (4th Cir. 1992); *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir. 1987); *United States v. Kail*, 804 F.2d 441, 445 (8th Cir. 1986); *United States v. Brien*, 617 F.2d 299 (lst Cir. 1980); *United States v. Kunze*, 806 F.2d 594, 598 (5th Cir. 1986).[14]

Other Circuits have adopted a more cautious approach to the standard of probable cause required to justify issuance of an all records warrant. The Tenth Circuit, for example, considers whether such a warrant could possibly have been tailored to provide a more specific description of the items to be seized, and insists that any authorization to seize "all records" be supported by a determination that there is probable cause to believe that all records are, in fact, pertinent to some alleged crime. Thus, in the Tenth Circuit, it is not enough to show pervasive fraud:

> "Moreover, to the extent the above cases can be read as allowing the seizure of all of an organization's records

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[14] In the Court of Appeals, Petitioner asserted that this doctrine violates the plain language of the Fourth Amendment to the Constitution. That amendment expressly states that no warrant shall issue "but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."" Const., Amend IV (emphasis added). Thus, the Constitution does not require particularity in just some cases. It demands particularity in every search warrant - irrespective of the nature of the conduct that triggered issuance of the warrant. Accordingly, the suggestion that fraud cases are somehow subject to a different standard is simply incorrect - the Fourth Amendment demands particularity in every case.

> when there is probable cause to believe the organization is pervasively criminal, whether or not those records are relevant to an alleged crime, we decline to follow them." *Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985).

See also, United States v. Leary, 846 F.2d 592, 601 (lOth Cir. 1988). In a recent case closely approximating the fact scenario in the case *sub judice*, the Sixth Circuit aligned itself with the Tenth. In *United States v. Ford*, 184 F.3d 566 (6th Cir. 1999), the Sixth Circuit concluded that even a showing that a business conducted at a particular site is "permeated with fraud" will not justify the issuance of an all records warrant that allows the seizure of documents unrelated to the allegedly fraudulent business:

> "Even if one business carried on at a site is permeated with fraud, if other businesses run at the same site are separable and are not shown to be related to the suspected crime, a warrant permitting seizure of all documents at the site is not justified."*Ford*, 184 F.3d at p. 577.

Thus far, Petitioner has discussed only cases involving situations in which an "all records warrant" authorized the search of a *business* premises and the seizure of *business* records. In this case, however, the Warrant was directed at premises that served as both Petitioner's home and his place of business. Since an individual's home is at the heart of the privacy interests protected by the Fourth Amendment, the courts have indicated that an "all records" warrant directed at a person's home will require the most compelling evidence that the person in question has lived a life entirely "consumed by fraud."

In *United States v. Humphrey*, 104 F.3d 65, 69 (5th Cir. 1997), the warrant authorized a search of premises that served as both the Humphreys' place of business and as their principal residence. Noting that "the Fourth Amendment requires much closer scrutiny of an all records search of a residence", the *Humphrey* court warned law enforcement authorities that a warrant authorizing an all records search of a home would be upheld only "in extreme cases":

> "Our holding today should not be read as a broad authorization for the issuance of all records searches of homes. We caution law enforcement agencies to draft warrants carefully to ensure the mandates of the Fourth Amendment are satisfied and note that it is *only in extreme* cases, *such as* the *one before us today, that we will uphold warrants of this type." United States v. Humphrey,* 104 F.3d 65, 69 n. 2(5th Cir. 1997) (emphasis added).[15]

In contrast to the Warrant at issue here, the warrant in *Humphrey* was limited to business records - the *Humphrey* warrant was not an open-ended license to search for and seize *any* tangible item found in the home. This distinction proved to be decisive in *Humphrey*, for the court ultimately upheld the search warrant in that case because the affidavits established that the fraud was pervasive, that there was considerable overlap of the Humphreys' business and personal lives, *and because of "the limitation of the warrant to business records." Humphrey*, 104 F.3d at 69. [emphasis added].[16] There was no such limitation here. Indeed, the Warrant directed at Petitioner's home authorized a search and seizure without boundaries - officers were empowered to seize anything they determined to be "related to" mail fraud or wire fraud.

In *United States v. Falon,* 959 F.2d 1143, 1148 (lst Cir. 1992) the First Circuit characterized the quantum of proof necessary to sustain an all records warrant directed at an individual's home as "extraordinary":

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[15] As explained above, the Smitherman Affidavit represented that the Government only intended to search "the part of the premises apparently and obviously designated and used by CHERNA to conduct his business." *Supra,* p. 8. In fact, the officers who executed the Warrant made no attempt to restrain the scope of their search to the business portion of the premises. They even searched Cherna's bedroom.

[16] The contrast between the *Humphrey* warrant and the one at issue here is readily apparent. *Humphrey*, 104 F.3d at 68-69, n.1.

> On the other hand, when an individual's allegedly fraudulent business activities are centered in his home - as apparently was the case here - the "all records" doctrine must be applied with caution. As the district court noted, it would require extraordinary proof to demonstrate that an individual's entire life is consumed by fraud and that all records found in the home were subject to seizure. Without such unusual proof, the broad categories of items that may be seized pursuant to an "all records" search of a home must be sufficiently linked to the alleged criminal activity so as to distinguish them from innocent, personal materials." *Falon,* 959 F.2d at 1148.

Applying these principles to the case at bar, it is clear that the Smitherman Affidavit did not establish "probable cause" to believe that "CHERNA'S entire business activities are merely a scheme to defraud" or that "CHERNA'S entire life is consumed by fraud." *App. 55a.* According to the Smitherman Affidavit, Petitioner and certain telemarketing companies were engaged in a fraudulent conspiracy to divert charitable donations to their personal use. *Agent Smitherman expressly acknowledged, however, that the Charities run by Petitioner did make donations.* In the opening pages of her affidavit, Agent Smitherman conceded that the Charities were at least making "meager [in her subjective view] donations to benefit hospitalized children and hospitalized veterans." *App. 40a.* She also recognized that contributions were actually made by AVRF to various veterans hospitals. *App. 47a.*

Petitioner respectfully submits that if the only affidavit submitted in support of the issuance of the "all records" Warrant directed at his home openly acknowledged that Petitioner's Charities had, in fact, performed at least some charitable service, then, as a matter of law, probable cause to support issuance of the all records Warrant did not exist. How can it be said that the *Humphrey/Falon* standard was satisfied when the Smitherman Affidavit itself contains facts directly refuting the contention that Petitioner's entire life was "consumed by fraud"?

Also troubling is the fact that Agent Smitherman's only support for her assertion that Petitioner was improperly siphoning funds from AVRF was premised on a disparity between the aggregate amount of donations received by AVRF and AVRF's cash contributions to various VA Hospitals:

> "I have reviewed the AVRF's tax return and financial statements for the tax year ended January 31, 1996, this is the same time period covered by the survey conducted by the VA. According to the documents I reviewed, AVRF's income for that year was at least $1,240,581.00. The amount of donations recorded by the VA for that year, $1249.00, is approximately one tenth of a percent of the amount of funds taken in by AVRF. This very meager amount contributed to VA hospitals leads me to believe that almost all the funds collected are being diverted to the personal use of the telemarketing companies and CHERNA." *App. 49a.*

She admitted that the only thing in her Affidavit to substantiate the conclusion that Petitioner had diverted funds from AVRF to his personal use was the above-quoted "comparison" of the donations recorded in AVRF's tax return to the total amount of donations made by AVRF to V.A. Hospitals during a one year period, as reflected in a Veterans Administration report:

> Q. Okay. My question is what evidence did you have that funds were being diverted by Mr. Cherna to his personal use that you put in that affidavit other than the comparison of the tax return to the total donations reflected in the V.A. Report?
> A. That appears to be all that's included in the affidavit regarding the American Veteran's Relief Fund." *App. 79a.*

Agent Smitherman was convinced that the disparity between the donations received by AVRF and the donations made to V. A. Hospitals by AVRF was enough to show that the "funds collected are being diverted to the personal use of the telemarketing companies and CHERNA." *App. 49a.* In fact, Agent Smitherman

was simply guessing. She admitted that she had not even received AVRF's bank statements at the time she executed her affidavit. *App. 83a-84a.* Further, Agent Smitherman's affidavit did not exclude the possibility that the donated funds were being used for donations to Veterans' organizations other than V. A. Hospitals. With respect to payments to telemarketing companies for fundraising services, Agent Smitherman's conclusion that such payments constitute evidence of fraud is directly contrary to the conclusion reached by this Court in *Riley v. National Federation Of The Blind*, 487 U.S. 781, 792-793, 108 S.Ct. 2667, 2675 (1988). In *Riley,* this Court expressly held that ". . . there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent. . .". *See also, Sec'y Of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). Thus, the mere fact that a paid charitable fundraiser retains 80% of the amount it collected for the benefit of the charity is simply not probative of a fraudulent scheme at all, let alone a scheme sufficiently pervasive to support issuance of an "all records" warrant.

Under the circumstances, Petitioner respectfully submits that the Smitherman Affidavit did not establish probable cause for the issuance of an "all records" warrant. As the issuance of such a warrant directed at the personal residence of a citizen on the basis of the showing made in the Smitherman Affidavit is a direct assault on the protections guaranteed by the Fourth Amendment, and because this Court has not yet addressed whether such a warrant is constitutional, and, if so, the showing required to justify its issuance, the Court should grant certiorari to address these issues.

III.

To Preserve The Rights Guaranteed By The Fourth Amendment, This Court Should Prevent The Abdication Of Judicial Authority In The Unprecedented Manner That Occurred In This Case

As further protection against the unconstitutional "roving commission" inherent in a general warrant, the Fourth Amendment requires that the scope of the search and the items to be seized be

determined by an impartial magistrate. The executing agents, no matter how well intentioned, are not permitted to draw the limits themselves:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer." *Katz v. United States*, 389 U.S. at 356, 88 S.Ct. 507 (1967).

The Fifth Circuit concluded that there was no evidence that the magistrate judge had abandoned his role as a neutral and detached judicial officer. *App. 7a-8a.* In reaching this conclusion, it is clear that the Fifth Circuit construed *Leon* to mean that the issuing magistrate will only be found to have abandoned his judicial role if he conducts himself in precisely the manner described in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319 (1979). Petitioner submits that this reading of *Leon* is much too narrow.

In *Lo-Ji Sales,* the Court concluded that the issuing magistrate had abandoned his judicial role when, after signing a "sweeping and open-ended" search warrant, he proceeded to accompany the police to the sight where the search was to be conducted, and reviewed materials on site to determine whether they should be seized. When he ordered an item to be seized, he would simultaneously direct the police officers to seize all similar items, "leaving determination of what was 'similar' to the officer's discretion." *Lo-Ji Sales*, 99 S.Ct. at 2325.

The Court determined that the magistrate had participated in "a generalized search under authority of an invalid warrant", and that he "did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." *Lo-Ji Sales*, 99 S.Ct. at 2324-2325.

Contrary to the Fifth Circuit's conclusion, this case is very close to the fact scenario in *Lo-Ji Sales*. Clearly, the magistrate here did not accompany the FBI when the warrant was executed. What he did do, however, was grant the FBI Agents absolute discretion to search for and seize whatever they wanted to. By signing a warrant that allowed the *FBI agents* free reign to

determine what might be "related to" mail fraud and wire fraud, he abdicated his role as a judicial officer. He ceased to function as the impartial intermediary that the Fourth Amendment requires. As evidenced by the testimony of Agent Smitherman, no item on the premises was off limits under the terms of the search warrant. *App. 93a.*

Petitioner respectfully submits that a magistrate can abandon his judicial role even if he stops short of joining the search party. *See, United States v. Decker*, 956 F.2d 773, 777 (8th Cir. 1992) (Judge can become a "rubber stamp" even if he engages in conduct short of becoming a participant in the search). It is enough that the magistrate yields his authority to determine the scope and extent of the search and seizure to the officers who execute the warrant. That is what Magistrate Judge Tolle did in this case. Accordingly, the good faith exception to the exclusionary rule cannot apply here because this case involves a scenario in which the Magistrate abdicated his judicial responsibility to the FBI.

IV.

The Fifth Circuit's Ruling In Petitioner's Case Conflicts With This Court's Analysis In *Massachusetts v. Sheppard*

The Fifth Circuit concluded that this case was governed by *Sheppard*. As described above, however, *supra, pp. 12-13,* the fact scenario in *Sheppard* is hardly analogous to the situation here. First, Agent Smitherman, the FBI Agent who drafted the Warrant, admitted that she inserted the "including, but not limited to" language in Attachment B to the Warrant so that the executing officers themselves could seize whatever they, in their judgment, determined to be of interest:

> Q. Doesn't that provide you with the discretion to determine precisely what relates to mail fraud or wire fraud?
> A. Yes. In case I neglected to put something in [sic] important on the list and I found an important piece of evidence, I wouldn't want to be precluded from being able to seize it.
> Q. Exercise discretion on site to seize that item?

A. Yes. *App. 93a.*

Thus, the officer here, in contrast to the officer in *Sheppard,* intentionally sought unfettered discretion to seize virtually any item located on the target premises. Clearly, the officer in *Sheppard* did not deliberatelysecure an unconstitutional warrant.Indeed, the record in *Sheppard* conclusively established that the officer who secured the warrant believed (based on the judge's own statements) that he had secured a valid warrant. Here, the converse is true. The officer who drafted the warrant and the supporting affidavit sought discretion to seize anything that was deemed to be "related to" mail fraud or wire fraud. That is enough to take this case outside *Sheppard's* good faith exception:

> "We are unaware of any Ninth Circuit or Supreme Court case which has applied *Sheppard* to a warrant approximating the degree of facial overbreadth which would preclude reasonable reliance. [Citations omitted.] However, even if a *Sheppard*-type good faith exception may be applied to such an overbroad warrant, the government is entitled to the exception in this case. The government does not argue that Inspector Portmann warned the magistrate of the apparent overbreadth of the warrants or that Portmann received specific assurances from the magistrate that the CAG warrants were not overbroad. [citations omitted.] *When the officer seeking the warrant is aware of an overbreadth problem, as Inspector Portmann was in this case, we can reasonably expect the officer to bring the problem to an impartial magistrate' s or judge's attention and to seek specific assurances that the possible defects will not invalidate the warrant." Center Art Galleries-Hawaii, Inc. v. United States,* 875 F.2d 747, 753 (9th Cir. 1989*)* (emphasis added).

Here, Agent Smitherman clearly understood that she was seeking discretionary authority to seize anything that she believed, in her discretion, might constitute evidence of mail fraud or wire fraud. There is no evidence that she called the limitless sweep of the request to the attention of the Magistrate Judge. Thus, *Sheppard* is

not applicable. *See also, United States v. Crozier,* 777 F.2d 1376, 1382 (9th Cir. 1985) (concluding that *Sheppard* analysis not applicable where evidence of executing officer's objective good faith was lacking; distinguishing *Sheppard* on the ground that the judge made the error in that case, and, therefore, officer acted in good faith).

Further, the affidavit in *Sheppard* described specific items to be seized - and those were the items that the officer actually did seize. Here, in contrast, neither the Warrant nor the Smitherman Affidavit placed limits on the items to be seized. By its terms, the Warrant here authorized the seizure of anything located in Cherna's home. *App. 33a-36a.* This factual difference is enough to distinguish *Sheppard* from the case at bar:

> "Here, of course, the facts differ. Neither the warrant nor the affidavit describe the items to be seized other than those six items which were described with particularity. [citations omitted]. Rather, it was left up to the agents and the officers to decide what was evidence demonstrating a violation of 18 U.S.C. §§ 1461 and 1462. Necessarily, they had to decide what was obscene. The lack of particularity in this case allowed the officers to rummage, at will, through the defendant's room as is evidenced by the items seized during the search." *United States v. Nader,* 621 F.Supp. 1076, 1083 (D.C.D.C. 1985).

Thus, this case, like *Nader,* is factually different from the scenario the Court confronted in *Sheppard.*

Petitioner respectfully submits that the Court should grant certiorari because the Fifth Circuit misconstrued and misapplied *Sheppard* in relying on that case to avoid suppression of the evidence seized at Petitioner's home. In contrast to *Sheppard,* this is a case where invoking the exclusionary rule would serve to deter police misconduct. As described above, the authorities did not act in an objectively reasonable manner when they secured the Warrant - they clearly knew (or should have known) that what they were doing was wrong.

CONCLUSION

For all the foregoing reasons, Petitioner Marvin Cherna respectfully requests that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed August 4, 1999]

No. 98-11097

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARVIN B CHERNA,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before KING, Chief Judge, SMITH and BARKSDALE, Circuit Judges.
KING, Chief Judge:

Defendant-appellant Marvin B. Cherna appeals his conditional plea of guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 on the ground that the district court erred in denying his motion to suppress evidence obtained pursuant to an allegedly unconstitutional search

warrant. Because we find that the executing officers acted in objectively reasonable good-faith reliance on the warrant, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In 1997, defendant-appellant Marvin B. Cherna was the executive director of Help Hospitalized Children's Fund (HHCF) and American Veterans' Relief Fund (AVRF), two charities based in Dallas, Texas. On May 19, 1997, Special Agent Loretta Smitherman of the Federal Bureau of Investigation (FBI) applied to Magistrate Judge John Tolle of the Northern District of Texas for a warrant to search Cherna's business and residence, both of which, she alleged, were located at 7610 Meadow Oaks Drive in Dallas, Texas. The application for the warrant referred to two documents: Attachment A, which set forth the place to be searched, and Attachment B, which described the evidence to be seized. Smitherman's affidavit in support of probable cause was also attached to the application. Without hearing oral testimony, Magistrate Judge Tolle issued a search warrant that authorized officers to search the premises described in Attachment A and to seize the property described in Attachment B. Attachment A stated that the "offices of HELP HOSPITALIZED CHILDREN'S FUND (HHCF) and AMERICAN VETERANS' RELIEF FUND (AVRF) are located at 7610 Meadow Oaks Drive, Dallas, Texas including all rooms/parts of the residence and the attached garage." Attachment B described the evidence subject to seizure thus: "Records and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman, within the premises of 7610 Meadow Oaks Drive, Dallas, Texas, including, but not limited to the following, however

maintained," followed by a list of twenty-six categories of evidence, primarily written and electronic documents. Smitherman's affidavit was not, however, physically attached to the search warrant.

The next day, May 20, 1997, six FBI agents executed the search warrant under Smitherman's direction. The agents' were required by FBI policy to read the warrant, the accompanying documents, and the affidavit prior to participating in the search and to sign the back of the warrant to show that they had done so. Smitherman did not know whether several other FBI employees who assisted in the search but did not participate in seizing evidence read the affidavit. Cherna was given a copy of the warrant and Attachments A and B but, although it was present in Smitherman's vehicle throughout the search, he was not shown the affidavit because it had been placed under seal. Upon entering the premises at 7610 Meadow Oaks Drive, the agents determined that four rooms were being used as office space and that the garage had been converted into a telemarketing room and a storage room for records. They did not limit their search to only these rooms, however, but also searched all areas in the residence where records might be stored, including the bedroom, kitchen, and living room. At the conclusion of the search, the agents left with Cherna the warrant, the attachments, and an inventory. of seized property.

On March 3, 1998, a grand jury in the Northern District of Texas returned an indictment charging Cherna with thirteen counts of mail fraud perpetrated by soliciting funds for two non-profit entities and then converting the contributions received to his own use. Cherna filed a motion

to suppress all evidence seized in the May 20, 1997 search. The district court denied this motion, concluding that "Attachment B to the search warrant sets out with sufficient particularity twenty-six types of items to be seized so as to remove the warrant from the purview of a general warrant" and, in the alternative, that "the officers executing the warrant acted in good faith and in reasonable reliance upon the warrant's validity, thereby avoiding the Fourth Amendment's exclusionary rule." Cherna then entered a conditional plea of guilty to one count of the indictment, reserving his right to appeal the district court's adverse ruling on his motion to suppress. The district court sentenced him to a four-year prison term and a $12,500.00 fine. Cherna appealed.

II. STANDARD OF REVIEW

When reviewing the denial of a motion to suppress, we review factual findings for clear error and the trial court's conclusions as to the constitutionality of law enforcement action and the sufficiency of a warrant de novo. See United States, v. Kelley, 140 F.3d 596, 601 (5th Cir.), cert. denied, 119 S. Ct. 186 (1998). The district court's determination of the reasonableness of a law enforcement officer's reliance upon a warrant issued by a magistrate--for purposes of determining the applicability of the good-faith exception to the exclusionary rule--is also reviewed de novo. See United States v. Satterwhite, 980 F.2d 317, 321 (5th Cir. 1992).

III. DISCUSSION

On appeal, Cherna attacks the search warrant on two grounds. First, he contends that it is an unconstitutional general warrant. Cherna argues that the warrant's general

grant of authority to seize "[r]ecords and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman . . ., including, but not limited to" twenty-six categories of evidence does not describe the evidence sought with sufficient particularity. Although the warrant refers to Smitherman's affidavit, Cherna contends, the affidavit cannot save the warrant because it was neither attached thereto nor shown to Cherna. Second, Cherna maintains that the warrant was unsupported by probable cause.

We employ a two-step process for reviewing a district court's denial of a motion to suppress when a search warrant is involved. See United States v. Lampton, 158 F.3d 251, 258 (5th Cir. 1998), cert. denied, 119 S. Ct. 1124 (1999). First, we determine whether the good-faith exception to the exclusionary rule announced in United States v. Leon, 468 U.S. 897 (1984), applies. If so, we end our analysis and affirm the district court's decision to deny the motion to suppress. See Satterwhite, 980 F.2d at 320. If not, we proceed to the second. step, in which we "'ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed.'" United States v. Pena-Rodriguez, 110 F.3d 1120, 1129 (5th Cir.) (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)), cert. denied, 118 S. Ct. 71 (1997). If the good-faith exception applies, we need not reach the question of probable cause. See id.; see also United States v. Craig, 861 F.2d 818, 820 (5th Cir. 1988) ("Principles of judicial restraint and precedent dictate that, in most cases, we should not reach the probable cause issue if a decision on the admissibility of the evidence under Leon will resolve the matter.").

We begin our analysis of the good-faith exception with Leon. In that case, the Supreme Court held that the Fourth Amendment does not require the suppression of evidence obtained as a result of objectively reasonable reliance on a warrant, even if the warrant is subsequently invalidated. See Leon, 468 U.S. at 922. Although the Court noted that "[w]hen officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time," id. at 924, it also cautioned that "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued," id. at 922-23 (footnotes and citation omitted). Thus, the good-faith exception does not apply when "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Id. at 923. Similarly, suppression remains an appropriate remedy where the issuing magistrate "wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant." Id. Nor is the exception available to an officer who relies on a warrant based on an affidavit "'so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable.'" Id. (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring)). "Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things

to be seized--that the executing officers cannot reasonably presume it to be valid." Id.

Cherna contends that the last three situations obtain here. First, he asserts that "the Warrant represents a complete abdication by the Magistrate Judge of his authority to determine what can and cannot be seized." As we explained above, Leon teaches that the good-faith exception will not apply where the magistrate conducted himself as did his counterpart in Lo-Ji Sales. In that case, an investigator purchased two films from a so-called "adult" bookstore, concluded that they violated state obscenity laws, and applied for a warrant to search the store, representing that not only copies of the films but other "similar items" would be found there. See Lo-Ji Sales, 442 U.S. at 321. The town justice viewed the films and issued a search warrant authorizing seizure of copies of the two films and "[t]he following items that the Court independently [on examination] has determined to be possessed in violation of Article 235 of the Penal Law," followed by a blank space. Id. at 321-22. The justice then accompanied law enforcement officers to the store and conducted a six-hour search during which he examined films, books, and magazines free of charge and ordered the officers to seize such items as he thought there was probable cause to believe obscene. See id. at 322-23. The Supreme Court held that the search violated the Fourth Amendment. It concluded that although "a warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," id. at 326 (internal quotation marks omitted), the town justice in Lo-Ji Sales "did not manifest that neutrality and detachment demanded of a judicial officer when presented

with a warrant application for a search and seizure," id. Instead, he conducted himself as an "adjunct law enforcement officer." Id. at 327.

After carefully reviewing the record, we conclude that there is no evidence that the issuing magistrate in this case abandoned his role as a neutral and detached judicial officer within the meaning of Lo-Ji Sales. Indeed, Cherna does not so much as allege that Magistrate Judge Tolle was biased. Cf. United States v. Breckenridge, 782 F.2d 1317, 1321 (5th Cir. 1986) ("The 'absence of a neutral and detached magistrate' exception to Leon's good faith may also extend to situations in which officers while presenting the affidavit realize that the magistrate served only to rubber-stamp a previous decision reached by the police."). Nor does he assert that the magistrate judge participated in the seizure of evidence so as to become an "adjunct law enforcement officer." Lo-Ji Sales, 442 U.S. at 327; cf. United States v. McKeever, 906 F.2d 129, 131-32 (5th Cir. 1990) (considering defendant's argument that evidence should be suppressed because magistrate was a former reserve police officer and visited the site of the search). We simply see no evidence that Magistrate Judge Tolle "wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales. . . ." Leon, 468 U.S. at 923.[1]

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[1] Cherna does suggest that Magistrate Judge Tolle abandoned his judicial role by issuing a search warrant that was insufficiently particular and supported by probable cause to pass Fourth Amendment muster. Under Leon, however, excessive generality and lack of probable cause are independent reasons not to apply the good-faith exception, and we therefore consider Cherna's arguments in this regard below. Cf. United States v.

Cherna also argues that the good-faith exception does not apply in this case because the warrant was insufficiently supported by a showing of probable cause. Under Leon, an officer may not reasonably rely on a warrant "so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (internal quotation marks omitted). In general, "[a]n officer may rely in good faith on the validity of a warrant so long as the warrant is supported by more than a bare bones affidavit." United States v. Cisneros, 112 F.3d 1272, 1278 (5th Cir. 1997) (internal quotation marks omitted). In evaluating whether the affidavit in this case justifies application of the good-faith exception, however, we must keep in mind that it is more difficult to demonstrate probable cause for an "all records" search of a residence than for other searches. United States v. Humphrey, 104 F.3d 65, 68-69 (5th Cir.), cert. denied, 520 U.S. 1235 (1997). In Humphrey, a fraud case, we upheld a warrant authorizing the seizure of all of the defendants' financial and business records from their residence because a three-page affidavit from an FBI agent demonstrated that the fraud was pervasive, that there was considerable overlap between the defendants' personal and business lives, especially in that they used their home as an office, and that the defendants provided services about which there had been many complaints, cashed a large number of

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Tedford, 875 F.2d 446, 449-50 (5th Cir. 1989) (analyzing as a single issue defendant's contentions that judge "abandoned his detached and neutral role by merely ratifying the officers' conclusions and issuing the warrant on the basis of 'bare bones' affidavits" and that "officers' reliance on the warrant was unreasonable because the underlying affidavits were completely 'lacking in indicia of probable cause'").

cashier's checks, and stored cash under their mattress. Id. We emphasized, however, that our holding "should not be read as a broad authorization for the issuance of all records searches of homes. . . . [I]t is only in extreme cases, such as the one before us today, that we will uphold warrants of this type." Id. at 69 n.2.

Even in light of the fact that the warrant in this case authorized an all records search of Cherna's home, we do not think probable cause was so lacking as to "render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (internal quotation marks omitted). The search warrant application included an eleven-page affidavit from FBI Special Agent Loretta Smitherman. Smitherman stated that she had been an FBI agent for six years. She had investigated Cherna, executive director of HHCF and AVRF. She discovered that in 1995 and 1996, HHCF solicited donations by representing that the money would benefit hospitalized children in the donor's community and that HHCF was a member of certain prestigious charitable organizations. In many instances, however, HHCF representatives were unable to name any hospitals that would receive donations, and hospital administrators in the relevant communities denied having heard of or receiving assistance from HHCF. Furthermore, representatives of several charitable organizations in which HHCF claimed membership stated that HHCF neither belonged to those groups nor had permission to use their names. HHCF maintained numerous local bank accounts, despite its own accountant's advice that it was financially and logistically preferable to have only one account, because, in Cherna's words, "the donors want to feel as if the money they are pledging is being spent in there [sic] area of the country." Smitherman also discovered that, although tax records showed

that HHCF executives served without compensation, HHCF regularly paid Cherna and an HHCF board member thousands of dollars, and numerous checks for what appeared to be personal expenses had been written on HHCF's account.

In addition, Smitherman related that she had reviewed ninety-three affidavits, provided to her by the Massachusetts Attorney General's office, in which private citizens described how AVRF telemarketers urged them to donate money, representing that (1) their donations would benefit local veterans' hospitals, (2) retired veterans would pick up the donations, and (3) the donations would be used to purchase medical supplies for hospitalized veterans. In fact, AVRF donated only $650.00 to Massachusetts veterans' hospitals during the years 1994 through 1996. AVRF's nationwide donations to hospitals run by the United States Department of Veterans' Affairs for the tax year ended January 31, 1996 totaled only one-tenth of one percent of its total income.

Finally, Smitherman averred that she had reason to believe that HHCF and AVRF had been and still were being operated out of Cherna's residence because, on February 13, 1997, two employees of Thomas Ewbank's accounting firm had been inside Cherna's home, where they observed two rooms set up as offices for HHCF and AVRF, and an auditor from the firm was scheduled to meet with Cherna there on the date Smitherman executed her affidavit, May 19, 1997. Furthermore, on April 18, 1997, a woman identifying herself as an AVRF employee accepted service of process at Cherna's home, and as of May 11, 1997, the electric account for the residence was listed in HHCF's name. Smitherman concluded that, after reviewing her affidavit in light of Humphrey with two Assistant United States Attorneys, she believed that

Cherna's business activities were "merely a scheme to defraud" and that there was "obviously considerable overlap Of Cherna's personal life and business life."

Smitherman's affidavit was not so "bare bones" as to render all belief in the existence of probable cause for an all records search unreasonable. Smitherman averred that Cherna operated his businesses from his home, that he used business funds to pay for what appeared to be personal expenses, and that HHCF and AVRF misrepresented the nature and amount of their charitable work in an effort to increase donations. She requested permission to seize all records and items relating to the mail and wire fraud scheme she believed to be in progress. Cf. Humphrey, 104 F.3d at 68-69 (finding probable cause for an all records search of defendants' home based on evidence that they used residence as office, engaged in suspicious financial transactions and provided services about which there had been many complaints). Although many of the misrepresentations described in Smitherman's affidavit took place in 1995 and 1996, one to two years before Smitherman applied for the warrant, she explained that, based on her conversations with employees of Ewbank's accounting firm, the acceptance of process by an AVRF employee at Cherna's residence only a month before the application, and the evidence that, a week before the search, the electric account for Cherna's residence was in the name of HHCF, it was likely that the records sought were still located at Cherna's home. Especially in light of the facts that HHCF and AVRF were ongoing businesses and that financial records typically are retained for long periods of time, we cannot say that Smitherman's affidavit was based on stale information. See United States v. Webster, 734 F.2d 1048, 1056 (5th Cir. 1984) ("[W]hen the

information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, the information need not be regarded as stale."); United States v. Freeman, 685 F.2d 942, 952 (5th Cir. 1982) (recognizing that bank records are likely to be kept for long periods of time). Of course, there could be, as Cherna argues in his brief, innocent explanations for the evidence Smitherman discovered, but an affidavit need not present a watertight criminal case to support good-faith reliance on a warrant.[2]

Finally, Cherna maintains that the warrant is so lacking in particularity that the executing officers could not reasonably have presumed it to be valid. Cherna points out that the warrant authorized the seizure of "[r]ecords and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI Loretta Smitherman" but failed to include the affidavit as an attachment. No law enforcement officer, he claims, could reasonably believe that a warrant for records and items relating to the broad crimes of mail and wire fraud is sufficiently particular to satisfy the Fourth Amendment.

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[2] Indeed, we have emphasized that probable cause to search is present where there is adequate "'information to allow the conclusion that a fair probability existed that seizable evidence would be found'" on the premises. Cisneros, 112 F.3d at 1279 (quoting United States v. Restrepo, 994 F.2d 173, 189 (5th Cir. 1993)). While Cherna's arguments might have been convincing to a jury had he gone to trial, they do not convince us that the lack of probable cause was so obvious as to deprive the officers of the good-faith exception to the exclusionary rule.

The seminal Supreme Court case on particularity and the good-faith exception is Massachusetts v. Sheppard, 468 U.S. 981 (1984). That case concerned a warrant authorizing a search for "controlled substances" that was accompanied by a detailed affidavit indicating that the affiant wished to search for evidence relating to a homicide investigation. See id. at 985-86. The defendant complained that the warrant was insufficiently particular. See id. at 987. It was undisputed, however, that the issuing judge and the executing officers knew the contents of the affidavit and the focus of the search and that the affiant had, in fact, pointed out the discrepancy to the judge, who had assured him that the necessary corrections would be made. See id. at 986. The Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable because the affiant prepared an affidavit that was reviewed and approved by the district attorney, presented the affidavit to a neutral judge, who found that it established probable cause for the search requested by the affiant, and informed the judge that changes might need to be made. He then observed the judge made some changes and received the warrant and the affidavit. See id. at 989. "At this point, a reasonable police officer would have concluded . . . that the warrant authorized a search for the materials outlined in the affidavit." Id.

We have considered similar situations in this circuit. In United States v. Beaumont, 972 F.2d 553, 560 (5th Cir. 1992), for example, the warrant contained only a generalized statement that "evidence of the commission of a criminal offense as well as contraband abd [sic] the fruits of crime" were to be seized. The warrant was accompanied by an affidavit that contained a detailed description of the items sought, but it did not refer to the affidavit at all. See id. We

found that although a warrant that relies on an affidavit to meet the Fourth Amendment particularity requirement must incorporate the affidavit by reference, see id. at 560-61, the good-faith exception applied:

> In the instant case, there was a probable cause determination made by the state judge, the affidavit provided specific information of the objects of the search, the executing officer was the affiant, the additional officers making the search knew what was to be searched for, and, finally, the warrant could easily have been made valid by the insertion of the phrase "see attached affidavit."

Id. at 561 (footnote omitted). For the same reasons, we held in United States v. Shugart, 117 F.3d 838, 845-46 (5th Cir.), cert. denied, 118 S. Ct. 433 (1997), that officers reasonably could have relied on a warrant that was insufficiently particular on its face and did not incorporate the affidavit on which it was based.

This precedent convinces us that the warrant in this case was not so lacking in particularity that the executing officers could not reasonably presume it to be valid. As in Sheppard, Beaumont, and Shugart, the issuing judge in this case made a probable cause determination, the affidavit explained in detail the alleged mail and wire fraud scheme that was the target of the investigation and search, the officer in charge of the search, Smitherman, was the affiant, and the other FBI agents who participated in the search read the affidavit before beginning it. Even assuming that the absence of the affidavit rendered the warrant constitutionally

defective, this defect could have been remedied with only minor corrections, such as the attachment of the affidavit. Cf. Sheppard, 468 U.S. at 990 n.7 ("This is not an instance in which 'it is plainly evident that a magistrate or judge had no business issuing a warrant.' . . . Indeed, Sheppard admits that if the judge had crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid."); Shugart, 117 F.3d at 845-46 (noting that a warrant that did not "incorporate" an affidavit could have been made valid with minor corrections, such asa reference to and attachment of the affidavit); Beaumont, 972 F.2d at 562 ("[T]he warrant could easily have been made valid by the insertion of the phrase 'see attached affidavit.'"). Smitherman was prevented from attaching her affidavit to the warrant or serving it on Cherna, however, because it had been placed under seal. In issuing a search warrant and sealing the affidavit on which the warrant is based, the magistrate judge was essentially assuring Smitherman that the warrant, unattached to the affidavit, was sufficient to authorize the search she had requested. The Fourth Amendment does not demand that the executing officers question his decision and determine for themselves whether the warrant is, in fact, valid. "Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." Sheppard, 468 U.S. at 989-90 (footnote omitted).

Nor is this a case in which the non-attachment of Smitherman's affidavit made the warrant so obviously

defective that the officers could not reasonably have relied on it. First, Attachment B, expressly mentioned in the warrant and attached thereto, referred to Smitherman's affidavit and described in considerable detail twenty-six categories of evidence to be seized. A reasonable executing officer, relying on the magistrate judge's issuance of the warrant and sealing of the affidavit, could have believed that the reference to the affidavit and the rather lengthy list that followed satisfied the Fourth Amendment's particularity requirement. Cf. United States v. Moser, 123 F.3d 813, 823 (5th Cir.) (approving search warrant authorizing seizure of "[r]ecords relating to the production, advertising, ordering, sale, mailing and shipment of material involved in the use of 'Certified Money Orders' by U.S.A. First and O.M.B., W.D. McCall. Such records, files and promotional material include but are not limited to . . ."), cert. denied, 118 S. Ct. 613 (1997).

Second, as Cherna concedes, where a warrant relies on an affidavit to specify the objects of the search, it is not entirely clear from circuit precedent that the affidavit must be physically attached to the warrant or served on the defendant. Compare United States v. Haydel, 649 F.2d 1152, 1157 (5th Cir. Unit A July 1981) ("If, as is the case here, the warrant is ambiguous, but fairly directs attention to the place actually searched, and if the affidavit supporting the warrant is attached to the warrant when issued, the affidavit may be considered to clarify an ambiguity on the face of the warrant. The affidavit must be attached to the warrant so that the executing officer and the person whose premises are to be searched both have the information contained in the affidavit, in addition to what is said on the face of the warrant.") (citation omitted and emphases added), opinion corrected on reh'g on other grounds, 664 F.2d 84 (5th Cir. Unit A Dec.

1981), with Shugart, 117 F.3d. at 845. ("In addition, this court has held that the particularity requirement may be satisfied 'by reliance on an affidavit when the affidavit is incorporated by reference into the warrant.'") (quoting Beaumont, 972 F.2d at 561) (emphasis added); United States v. Wuagneux, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982) (noting, shortly after the Eleventh Circuit split from the Fifth, that "although the record in Haydel was not entirely clear on whether the affidavit was physically attached, the record did indicate that it was available at the search site and that the searching agents knew what they were looking for" and opining that Haydel "mandates a more flexible approach" than a strict requirement that the affidavit be physically attached to the warrant or served on the defendant); United States v. Cook, 657 F.2d 730, 736 (5th Cir. Unit A Sept. 1981) ("The affidavit, which was referred to and which accompanied the warrant, supplied a particular description. . . .") (emphasis added). But see United States v. McGrew, 122 F.3d 847, 850 (9th Cir. 1997) ("If the government wishes to keep an affidavit under seal, it must list the items it seeks with particularity in the warrant itself. It is the government's duty to serve the search warrant on the suspect, and the warrant must contain, either on its face or by attachment, a sufficiently particular description of what is to be seized . . . . If the 'incorporated' affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents."); United States v. Dahlman, 13 F.3d 1391, 1395 (10th Cir. 1993) (holding that affidavit could not cure particularity problem because, inter alia, there was no indication in the record that affidavit had been "physically attached to the warrant"). Given the state of the law in this

circuit, we cannot say that the executing officers could not reasonably rely on the magistrate judge's issuance of the warrant, even though he simultaneously sealed the affidavit on which it was based.

Finally, we must address Cherna's contention that Smitherman's testimony at the suppression hearing "clearly demonstrates the absence of objective good faith." According to Cherna,

> Agent Smitherman candidly acknowledged that she drafted the Warrant to allow her the unfettered discretion to seize whatever she deemed to be of interest. That is precisely the type of governmental "roaming" that the Fourth Amendment's particularity requirement was designed to prohibit. Thus, regardless of Agent Smitherman's subjective intent, the objective record demonstrates that the good faith exception cannot save this Warrant.

(citation omitted). We note as an initial matter that this argument is more correctly characterized as an allegation that Smitherman acted in "subjective," not "objective," bad faith: Cherna claims that Smitherman drafted the warrant so as intentionally to flout the Fourth Amendment's particularity requirement. The district court, however, found that "the officers executing the warrant acted in good faith." At the suppression hearing, the following colloquy took place between Smitherman and Cherna's counsel:

> Q. Can you think of one thing that wouldn't relate to it? If his entire life is

consumed by fraud, wouldn't everything inside 7610 Meadow Oaks, based upon your affidavit, be subject to seizure under the terms of that warrant?

A. Photographs of his children wouldn't be seized, you know, religious materials. You want me to make up a list of things that wouldn't be seized?

Q. No. I think--

A. Anything that didn't have to do with fraud wouldn't be seized.

Q. But the question I have is how would you draw the line if he paid for the camera that took those pictures, paid to develop--cost of those picture with the proceeds of charitable donations, you could seize anything under the terms of this warrant.

A. No, only things that had to do--that were evidence of mail fraud and wire fraud.

Q. Okay. As set forth in your affidavit?

A. Yes.

Q. And your affidavit just--I'm going to make this very clear, was never given or supplied to Mr. Cherna?

A. That's right.

Q. So he had absolutely no way to determine what the scope of your search would ultimately be?

A. No, he did because I gave him the attachment B that .is entitled Property to be Seized.

Q. Which describes the property seized to be records and items related to fraud by wire and mail fraud as described in your affidavit, which was not supplied to him?

A. Yes. But then there are--there is several pages describing the items that will be seized.

Q. Well, are those all of the items that will be seized? Your paragraph--your lead-in paragraph to attachment B says including but not limited to the following.

A. It's-

Q. Doesn't that provide you with the discretion to determine precisely what related to mail fraud or wire fraud?

A. Yes. In case I neglected to put something in important on the list and I found, an important piece of evidence, I wouldn't want to be precluded from being able to seize it.

Q. Exercise discretion on site to seize that item?

A. Yes.

While we agree that this testimony is sometimes equivocal, we cannot say that the district court clearly erred in finding that Smitherman acted in good faith. Smitherman did not admit that she had drafted the warrant to give her complete discretion to seize any item she wished; instead, she stated repeatedly that the warrant authorized the seizure only of evidence related to mail and wire fraud as described in her affidavit. While she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence, she apparently also believed that Attachment B adequately identified the scope of her search. Quite simply, Cherna can point to no testimony establishing that Smitherman intended to violate the Fourth Amendment. We decline to disturb the district court's finding that she acted in good faith.

We conclude that the good-faith exception to the exclusionary rule applies in this case. "The officers in this

case took every step that could reasonably be expected of them." Sheppard, 468 U.S. at 989. Smitherman prepared a detailed affidavit that was "reviewed by two Assistant United States Attorneys. She then presented the affidavit to a neutral magistrate judge, who found it sufficient to support probable cause to search Cherna's residence and issued a warrant authorizing such action. Although he sealed the affidavit, the warrant referenced it and contained a list of twenty-six categories of evidence subject to seizure. All the officers participated in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search. Our law simply does not require a reasonable officer to do more.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[File July 2, 1998]

No. 3:98-CR-0072-T

UNITED STATES OF AMERICA	)
	)
v.	)
	)
MARVIN B. CHERNA	)
	)

ORDER MEMORIALIZING RULING
ON MOTION TO SUPPRESS

On July 1, 1998, the Court held a hearing on Defendant Marvin B. Cherna's Motion to Suppress, filed on June 12, 1998. After hearing evidence and argument, the Court denied the motion.

On May 20, 1997, Special Agents of the Federal Bureau of Investigation, suspecting that Defendant had committed both mail and wire fraud in connection with running two charitable fundraising entities, conducted a search of 7608 Meadow Oaks Drive, Dallas, Texas, which served both as Defendant's home and business offices. The

Special Agents conducted the search pursuant to a warrant issued by a magistrate judge on May 19, 1997.

In his motion to suppress, Defendant challenges the constitutionality of the search on the basis that the warrant is defective. Defendant's primary argument is that the warrant is so broadly written as to constitute a general warrant and, therefore, it is insufficient to meet the particularity requirement of the Fourth Amendment. The government responds that the affidavit of Special Agent Smitherman tendered in support of the application for the warrant cures the defect, if any, in the warrant itself.

After hearing evidence and argument, the Court expressly finds that Special Agent Smitherman's affidavit is sufficient to show probable cause for the issuance of the search warrant. Further, the Court finds that Attachment B to the search warrant sets out with sufficient particularity twenty-six types of items to be seized so as to remove the warrant, from the purview of the prohibition of a general warrant.

The commission of fraud usually involves secrecy and deception. Therefore, it is virtually impossible to provide in advance exact descriptions of the items to be seized pursuant to a particular warrant. Even so, Attachment B sufficiently describes the types of items to be seized. For example, Attachment B states that items subject to seizure as possible evidence of wire and mail fraud include "business records and documents, including, but not limited to, scripts and other instructions and directives to telemarketers." Fraud via telemarketing schemes usually follows a pattern of use of scripts provided to the telephone operators and

misrepresentations as to what use will be made of the funds collected. Attachment B's description of items subject to seizure in this regard is as specific as it can be under the circumstances.

As another example, it is seldom known precisely beforehand what items were fraudulently purchased or paid for by the funds collected. Attachment B to the search warrant, however, directs seizure of "[r]eceipts of [sic] other documentation of the purchase of items of value, such as jewelry, electronic equipment, vacation packages, automobiles, etc." which might indicate that Defendant used charitable proceeds for his personal use. In the context of a secretive fraud scheme, the Court concludes that this category of documents covered under the warrant is sufficiently specific to meet the particularity requirement of the Fourth Amendment.

In the investigation of fraud cases, it is difficult--if not impossible--for investigators to discover the precise method and instrumentalities used in perpetuating the fraud before conducting an actual search. The Court concludes that the warrant under consideration here succeeds in particularizing, the types of items which could reasonably be connected to Defendant's alleged mail and wire fraud and, therefore, could be subject to seizure.

In the alternative, and on the assumption that the warrant is, in fact defective, the Court finds that the officers executing the warrant acted in good faith and in reasonable reliance upon the warrant's validity, thereby avoiding the Fourth Amendment's exclusionary rule. *See United States v. Kelley*, 140 P.3d 598, 602-03 (5th Cir. 1998). As such ,the

District Court Order Denying Rehearing - 7/2/98

Court denies Defendant's motion to suppress on the basis of a defective search warrant.

It is therefore **ORDERED** that Defendant Marvin B. Cherna's Motion to Suppress, filed on June 12, 1998, is hereby **denied**.

Signed this 2nd day of July, 1998.

/s/_____
Robert B. Maloney
U.S. District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed September 8, 1999]

No. 98-11097

UNITED STATES OF AMERICA	)
Plaintiff - Appellee	)
	)
v.	)
	)
MARVIN B. CHERNA	)
Defendant - Appellant	)
	)

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before KING, Chief Judge, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/_____
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

[Issued May 19, 1997]

No. 3-97-178-M

In the Matter of the Search of
(Name, address of Brief description
of person, property or premises
to be searched)

SEARCH WARRANT

7610 Meadow Oaks Dr.
Dallas, Texas

To: Special Agent Loretta Smitherman, FBI and any Authorized Officer of the United States.

Affidavit(s) having been made before me Special Agent Loretta Smitherman, Affiant who has reason to believe that on the person of or XX on the property or premises known as (name, description and/or location)

(SEE ATTACHMENT A.)

in the NORTHERN District of TEXAS there is now concealed a certain person or property, namely (describe the person or property to be seized)

(SEE ATTACHMENT B).

Search Warrant Issued 5/19/97

I am satisfied that the affidavit(s) and any recorded testimony establish probably cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMENDED to search on or before May 29, 1997.
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same leaving copy of this warrant and receipt for the person or property taken and prepare a written inventory of the person or property seized and promptly return this warrant to JOHN B. TOLLE, United States Magistrate Judge as required by law.

May 19, 1997 3:27 P.M.
Date and Time Issued

at Dallas Texas
City and State

JOHN B. TOLLE, United States Magistrate Judge
Name and Title of Judicial Officer

/s/_____
Signature of Judicial Officer

Search Warrant Issued 5/19/97

ATTACHMENT A

The offices of HELP HOSPITALIZED CHILDREN'S FUND (HHCF) and AMERICAN VETERANS' RELIEF FUND (AVRF) are located at 7610 Meadow Oaks Drive, Dallas, Texas including all rooms/parts of the residence and the attached garage.

This location is further described as a one-story, duplex residence (Marvin Cherna's business and residence), the left (when facing the duplex from the street), or east side of which is occupied by HHCF and AVRF. The duplex has an attached, rear-entry garage and fenced backyard.

The west side of the duplex has the address 7608 Meadow Oaks Drive, Dallas, Texas, and is not considered a part of the premises to be searched.

Search Warrant Issued 5/19/97

ATTACHMENT B

PROPERTY TO BE SEIZED

Records and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman, within the premises 7610 Meadow Oaks Drive, Dallas, Texas, including, but not limited to the following, however maintained:

1. "Help the Hospitalized Children's Fund" (HHCF) and "American-Veterans' Relief Fund" (AVRF) business records and documents including, but not limited to, scripts and other instructions and directives to telemarketers, address and telephone records of associates, donors, bank records, notes, sales, income and commission records, invoices, contracts, asset and investment records, receipts and other documents recording the disposition of income, facsimile documents, or other correspondence, "hard-copy" printouts, and cash, checks, or other monetary instruments, which provide evidence of interstate communications or utilization of the United States Postal Service, for the telemarketing and other related operations, and any income derived therefrom, along with any ledgers, journals or other record-keeping systems, however maintained;

2. Access devices, words, and/or measures including keys, combinations, and passwords, which provide access to locked desk drawers, locked cabinets, locked briefcases, safes, safe deposit boxes, and/or protected computer files, which contain records;

3. Computers, disks and diskettes, associated hardware and software, computer terminals, computer modems, computer monitors, computer disc drives, central processing units, computer printers, and other associated hardware, manuals, software, and information systems;

4. All Documentation relating to all for-profit and non-profit organizations, corporations, businesses, etc., of which MARVIN CHERNA is a board member, officer, volunteer or employee, or in which MARVIN CHERNA has .an ownership interest;

5. Documentation relating to any and all HHCF and AVRF financial accounts in which MARVIN CHERNA has a financial interest, including but not limited to checking accounts, savings accounts, certificates of deposit, brokerage accounts, mutual fund accounts, credit, card accounts, etc.;

6. Employee records, including applications for employment and payroll records;

7. Documentation relating to donors, along with promotional video and brochures provided to donors;

8. Documentation of all branch offices or regional offices, including addresses, PO boxes and telephone numbers;

9. Contracts and correspondence with fundraisers;

10. All telephone scripts, brochures, etc. provided to fundraisers;

11. Names, addresses and telephone numbers of all HHCF and AVRF board members and officers;

12. Names, addresses and telephone numbers of all volunteers, including documentation of work performed;

13. Corporation documents, assumed name certificates, and meeting minutes;

14. Names and addresses of all hospitals which were supported in any way;

15. Agreements and correspondence with hospitals or other medical facilities;

16. Documentation of toys, books, games, and therapeutic equipment provided to the hospitals or to any patients of the hospitals;

17. Receipts for, or other documentation of, the purchase or rental of toys, books, games and therapeutic equipment, or receipts provided to donors for those items;

18. Documentation of counseling services and/or support groups to which hospitalized children or their parents have been referred;

19. Documentation of hospitals or patients/families which have received referrals to counseling services and/or support groups;

20. Documentation of financial support provided for medical, research projects;

21. Documentation of assistance provided to homeless and hungry children;

22. Documentation of assistance provided to programs for children who have AIDS or are HIV positive;

23. All educational and fundraising materials provided to donors, fundraisers and hospitals;

24. Documentation of special events sponsored or arranged;

25. Names, addresses, telephone numbers and names of contact persons for any organizations of which. HHCF is a member, including but not limited to GIVE KIDS THE WORLD, THE NATIONAL ORGANIZATION OF RARE DISORDERS, the ASSOCIATION FOR THE CARE OF CHILDREN'S HEALTH, CHILD LIFE COUNCIL and CHAMBER OF COMMERCE. Including documentation of membership, such as certificates of membership, receipts for payment of dues, etc.;

26. Receipts of other documentation of the purchase, of items of value, such as jewelry, electronic equipment, vacation packages, automobiles, etc. indicative that CHERNA spent the money he obtained fraudulently on personal expenses and personal items.

all of which are a means of committing a criminal offense, fruits, instrumentalities, and evidence of a violation of Title 18, United States Code, Section 1341 and Section 1343, and subject to seizure pursuant to Rule 41 of the Federal Rules of Criminal Procedure.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

[Filed May 19, 1997]

No. 3-97-178-M

In the Matter of the Search of
(Name, address of Brief description of person, property or premises to be searched)

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

7610 Meadow Oaks Dr.
Dallas, Texas

I Loretta Smitherman being duly sworn depose and say:

I am a(n) Special Agent of the Federal Bureau of Investigation and have reason to believe that __ on the person of or XX on the property or premises known as (name description and/or location)

(SEE ATTACHMENT A).

in the NORTHERN District of TEXAS there is now concealed a certain person or property, namely (describe the person or property to be seized)

(SEE ATTACHMENT B).

which is (state one or more bases for search and seizure set forth under Rule 41 (b) of the Federal Rules of Criminal Procedure) contraband, the fruits of the crime and things criminally possessed, property which constitutes evidence of the commission of a criminal offense, or property designed or intended to be designed for use or which is or has been used as the means of committing a criminal offense.

concerning a violation of Title 18 United States code, Section(s) 1341 & 1343
The facts to support a finding of Probable Cause are as follows:

(SEE ATTACHED AFFIDAVIT).

Continued on the attached sheet and made a part hereof.
XX Yes ___ No

/s/_____
Loretta Smitherson
Signature of Affiant

Sworn to before me, and subscribed in my presence
May 19, 1997 at Dallas, Texas
Date and Time Issue City and State

JOHN B. TOLLE
United States Magistrate Judge /s/_____
Name and Title of Judicial Officer Signature of Judicial Officer

AFFIDAVIT

I, Loretta Smitherman, Special Agent, Federal Bureau of Investigation (FBI), being duly sworn, depose and state as follows:

I have been a Special Agent for six years and am currently assigned to the Dallas Division of the FBI. I am an investigative or law enforcement officer of the United States within the meaning of Title 18, United States Code (USC), Section 2510 (7), that is an officer of the United States who. is empowered by law to conduct investigations of, and to make arrest for, offenses enumerated in Title 18, USC, Sections 1341 and 1343.

During my training at the FBI Academy in Quantico, Virginia, I learned methods of detecting and investigating confidence schemes, telemarketing fraud and other types of fraud. In my six years as an FBI agent, I have specialized in fraud investigations. As part of my duties, I have been assigned to conduct mail fraud and wire fraud investigations. During my entire FBI career, I have worked on fraud cases. I have investigated numerous fraud schemes and I've conducted several large-scale fraud investigations.

I am currently engaged in an investigation involving MARVIN B. CHERNA, executive director OF HELP HOSPITALIZED CHILDREN'S FUND (HHCF) and AMERICAN VETERANS' RELIEF FUND (AVRF). HHCF and AVRF are operated by CHERNA from a residence located at 7610 Meadow Oaks Drive, Dallas, Texas, which is within the Northern District of Texas. I have reason to

believe that CHERNA is conspiring with unknown individuals to commit mail fraud and wire fraud.

This affidavit is made in support of an application for a warrant to search the premises of 7610 Meadow Oaks Drive, Dallas, Texas.

Based on my investigation, I believe that CHERNA and telemarketers employed by CHERNA are making intentional and material misrepresentations to individuals of the public in order to induce them to donate to HHCF and AV1RF. CHERNA and the telemarketers are then diverting donations to their own use and making very meager donations to benefit hospitalized children and hospitalized veterans.

As part of my investigation I have interviewed witnesses and reviewed affidavits of complaint made by individuals who have been solicited by HHCF and AVRF for contributions. These complaints have been made to local Better Business Bureaus and State Attorney General's offices. I have reviewed bank account records for HHCF, AVRF and CHERNA. I have reviewed tax returns, financial statements and audit workpapers for HHCF and AVRF. I have reviewed certifications made by CHERNA to the COMBINED FEDERAL CAMPAIGN in regard to HHCF. I have reviewed documents filed by CHERNA with various States for the purpose of registering HHCF and AVRF to raise funds.

MISREPRESENTATIONS REGARDING HHCF

I have reviewed several complaints made by individuals who were solicited for donations by HHCF.

These individuals received telephone calls from professional fundraisers and also received HHCF pledge letters and brochures through the United States mail. Misrepresentations made to these individuals are that 1) the funds donated go to benefit children hospitalized in hospitals in the donor's community; 2) that part of the money donated would be spent to send sick children to WALT DISNEY WORLD through another organization called GIVE KIDS THE WORLD; 3) that the Director, MARVIN CHERNA, and other board members of HHCF serve without compensation; 4) and that the majority of funds donated are used for charitable purposes. The following are some specific examples of individuals who were solicited by HHCF.

On or about April 20, 1995, BILL BEECHER of Dallas, Texas, received a letter from HHCF requesting that he mail in a donation to HHCF. The letter was signed by MARVIN CHERNA, who was identified as President of HHCF. Enclosed with the letter was a brochure for HHCF. The brochure stated that "HHCF is an active member of CHAMBER OF COMMERCE, ASSOCIATION FOR THE CARE OF CHILDREN'S HEALTH, CHILD LIFE COUNCIL, GIVE KIDS THE WORLD, NATIONAL ORGANIZATION FOR RARE DISORDERS." The FBI has interviewed officials with the CHILD LIFE COUNCIL and GIVE KIDS THE WORLD, and both organizations have no records showing that HHCF has ever been a member or of having received any financial support from HHCF. As part of my training and experience I know that individuals who engage in confidence schemes often use the names of well-known and respected organizations to make themselves seem more reputable and to make it appear that they are endorsed by those respected organizations.

On March 28, 1996, MARSHA COOPER, CHILD LIFE COUNCIL, Washington, D.C., advised the FBI that HHCF is not and never has been a member of the CHILD LIFE COUNCIL, nor did HHCF have permission to use the name of the CHILD LIFE COUNCIL in its brochures.

On April 18, 1997, STEPHEN SALLEY, GIVE KIDS THE WORLD, Orlando, Florida, advised the FBI that HHCF is not and never has been a member of GIVE KIDS THE WORLD. SALLEY advised that HHCF had never provided any type of financial support to GIVE KIDS THE WORLD, nor had HHCF ever sent any children to WALT DISNEY WORLD through GIVE KIDS THE WORLD. HHCF did not have permission to use the name of GIVE KIDS THE WORLD in its brochures.

On May 31, 1996, TRACI L. JACIN of North Royalton, Ohio, received a letter from HHCF signed by MARVIN CHERNA, who was identified as the Executive Director of HHCF. Enclosed with the letter were a brochure for HHCF and a 1994 Annual Report for HHCF. The Annual Report contains the statement, "We are members of Give Kids the World, which provides trips to Disney World and the Orlando area for terminally and chronically ill children and their families. We are also members of the National Organization of Rare Disorders, the Association for the Care of Children's Health, Child Life Council and Chamber of Commerce." The 1994 Annual Report lists several goals for the coming year. One of those goals was, "Send 20 or more children and their families to the "Give the Kids the World" program." I believe that these statements are intended to make the potential donor believe that HHCF is actively participating in sending children to WALT DISNEY WORLD

through GIVE KIDS THE WORLD. As I mentioned previously, GIVE KIDS THE WORLD has no record of any financial support by HHCF. HHCF's stated goal was to send 20 sick children to WALT DISNEY WORLD, but according to the records of GIVE KIDS THE WORLD, they did not send even one.

A few days before receiving information regarding HHCF through the mail, JACIN had been contacted by telephone by a woman who said she was with NON-PROFIT TELEMEDIA and was soliciting donations for HHCF. JACIN asked the woman if the donation she made would benefit children who were hospitalized in her community. The woman told JACIN that although HHCF was a nationwide organization, all funds went back to hospitals in the cities from which they were solicited. When asked, the woman was unable to name any hospitals in JACIN's community which would benefit from HHCF. The letter JACIN received from HHCF on May 31, 1996, had a postscript which stated, "Our agreement with the hospitals we serve does not permit us to give out their names but we serve numerous hospitals throughout the state of Ohio." JACIN also asked the woman what percentage of the monies raised went to the charity and what percent went to NON-PROFIT TELEMEDIA. The woman told JACIN that 100% of the funds went to the charity and that the charity then paid expenses from that amount. The woman said that approximately 20% of funds raised would go to cover administrative costs.

I have reviewed a copy of a contract between HHCF and NON-PROFIT TELEMEDIA. According to the contract,

at least 75% of funds raised were to be paid to NON-PROFIT TELEMEDIA as commission.

On February 22, 1996, STAN BERSIN of Peoria, Illinois, was contacted by telephone by a woman named LINDA THOMPSON. THOMPSON said she was soliciting donations for HHCF. THOMPSON led BERSIN to believe that any money donated would be used for hospitals in BERSIN's community. THOMPSON was unable to name which hospitals in BERSIN'S area would benefit. BERSIN agreed to make a donation. A few days later, BERSIN received a pledge confirmation letter in the mail. The letter was signed by MARVIN CHERNA and had a return address which read, "PEORIA AREA PROGRAM DEVELOPMENT PROJECT," and gave a post office box in Springfield, Illinois. Included with the letter was a brochure for HHCF. Printed on the brochure was the logo for the CHILDREN'S HOSPITAL OF ILLINOIS AT SAINT FRANCIS MEDICAL CENTER of Peoria, Illinois.

On April 22, 1996, DEB WEST, Vice President of Development, CHILDREN'S HOSPITAL OF ILLINOIS AT SAINT FRANCIS MEDICAL CENTER in Peoria, Illinois, advised the FBI that HHCF had used her hospital's logo in their brochures without permission and that her hospital had never received any donations from HHCF. Furthermore, WEST had contacted the two other hospitals in Peoria and administrators at those hospitals had never heard of HHCF or received donations from HHCF.

I believe that individuals associated with HHCF deliberately misrepresented to BERSIN by telephone that his donation would benefit a local hospital, and that the logo for

the CHILDREN'S HOSPITAL OF ILLINOIS AT SAINT FRANCIS MEDICAL CENTER was placed on the HHCF brochure to further mislead BERSIN.

On April 16, 1996, LISA JOHNSON of Nashville, Tennessee, advised the FBI that she had recently been telephoned by a man who was soliciting funds for HHCF. The man claimed that HHCF made donations to local hospitals and that HHCF maintained "an office in downtown Nashville." When asked for the address, the man provided a post office box in Nashville. JOHNSON asked the man which hospitals in her area received donations from HHCF and the man answered, "All of them." The man provided JOHNSON with an 800 number which she could contact to receive additional information about HHCF. A woman who answered the phone at the 800 number told JOHNSON that although HHCF is based in Dallas, Texas, local donations are given to local hospitals. A few days later JOHNSON was again contacted by HHCF. The woman who called said she was calling from Arkansas, but that she was soliciting for HHCF's NASHVILLE PROGRAM PROJECT. JOHNSON asked this woman which local hospitals received assistance from HHCF. After consulting with her "Director," the woman told JOHNSON that all the local hospitals received assistance from HHCF, although the woman was unable to name any of the hospitals. JOHNSON was aware of ten hospitals in the Nashville area. She contacted administrators at all ten hospitals and none of them had ever heard of HHCF, nor had they received any type of support from HHCF.

In April and May, 1997, I reviewed the financial audit workpapers of the accounting firm that performed audits of HHCF for the years 1993 through 1996, and for AVRF for

the years 1995 and 1996. My review of these documents has revealed that HHCF and AVRF have set up numerous local bank accounts and post office boxes throughout the United States. Donations are mailed to a local address and deposited into a local bank account. The funds are then transferred to bank accounts in Dallas, Texas. In his notes for the HHCF audit for the period ending September 30, 1993, the accountant who performed the audit expressed concern to the Director of HHCF and AVRF, MARVIN CHERNA, that this arrangement was not the best method for maintaining control of donations. The accountant advised CHERNA that it would be preferable to have one central bank account for the deposit of all donations and one address where the donations could be mailed. According to the notes of the accountant, when these concerns were presented to CHERNA, CHERNA explained to the accountant that one reason for the numerous local bank accounts was that "the donors want to feel as if the money they are pledging is being spent in there [sic] area of the country. This is done by having the telemarketers open bank accounts in these areas and when the donors see that their check was cashed in an area bank they are more likely to contribute in the future."

I believe that CHERNA and other individuals working for HHCF and AV1RF have conspired to commit mail fraud and wire fraud by misrepresenting to potential donors that their donations will benefit hospitals in their communities. I believe that these individuals have set up numerous local post office boxes and bank accounts to further their scheme. My review of the financial audits of HHCF and AVRF and of contracts between telemarketers and HHCF and AVRF has revealed that 75% to 80% of the funds donated are paid to the telemarketers.

MISREPRESENTATIONS REGARDING AVRF

In April and May 1997, I reviewed 93 affidavits of public citizens which were provided to me by the Office of the Attorney General for the State of Massachusetts. Most of these affidavits pertain to individuals who were solicited by telephone to make donations to AVRF. Misrepresentations made to potential donors by AVRF were 1) that their donations would benefit local veterans' hospitals; 2) that retired veterans would come by to pick up the donations; 3) that their donations would be used to purchase wheelchairs, crutches and other medical supplies for hospitalized veterans.

The documents provided by Massachusetts revealed that donations were not picked up by retired veterans, but by couriers hired by CHARITABLE PUBLICATIONS, a fundraiser employed by AVRF, operating out of Pawtucket, Rhode Island.

The Massachusetts Attorney General's Office surveyed all veterans' hospitals in the State of Massachusetts and determined that as of January 15, 1997, veterans' hospitals in Massachusetts had received a total of only five donations from AVRF: one in 1994; two in 1995; and two in 1996. The donations consisted of one $500.00 cash donation, a few games and books and three gift baskets. The estimated total value of all gifts from the AVRF was estimated at $650.00.

On or about June 18, 1996, GEORGE DEXTER of Taunton, Massachusetts, received a telephone call from a man who said that he was calling on behalf of the AVRF. The caller asked DEXTER to make a donation to the AVRF. The

caller said that the donation would benefit the local veterans' hospital in Brockton, Massachusetts.

On or about August 26, 1996, CHARLES KEARNEY of Marshfield, Massachusetts, received a telephone call from a man who said that he was calling for the AVRF. He said that AVRF was looking for donations to purchase beds for veterans' hospitals in Massachusetts.

On November 11, 1996, FRANK ZARRELLA of Braintree, Massachusetts, received a telephone call from a man who said he was with the local Braintree Chapter of the AVRF. ZARRELLA agreed to make a donation. Someone came by the next day and left an envelope and a brochure for AVRF. The brochure stated that the fund provided veterans with "comfort items, toiletries and clothes, wheelchairs, crutches" and other items. The AVRF brochure also stated, "Due to budget cutback, the services and items we supply are needed more now than ever before."

On August 12, 1996, JEAN LANK of Braintree, Massachusetts, received a phone call from a woman who said she was calling on behalf of the AVRF. The woman said the AVRF provides medical supplies like wheelchairs to veterans in veterans' hospitals. LANK asked the woman if it was not the Veterans' Administration that provided medical supplies to veterans in veterans' hospitals. The woman replied, "Oh, no ma'am," and said that the medical supplies were not being provided due to government cutback in funding.

Individuals with AVRF have-misled potential donors by stating that AVRF provides medical and therapeutic equipment to veterans in veterans' hospitals. ERIC RAUN,

Office of General Counsel, DEPARTMENT OF VETERANS' AFFAIRS (VA), Washington, D.C., advised the FBI that there had been no cutbacks recently in the VA's budget for medical supplies. RAUN was aware of no eligible veteran who was in need of crutches, a wheelchair, etc., who had not had those needs met by the VA. RAUN advised that, in January 1997, the Office of Voluntary Service of the VA conducted a survey of all VA hospitals in the United States to determine what donations had been received by AVRF during the time period January 1, 1995, through January.31, 1996. RAUN advised that each VA hospital has a Voluntary Service Chief who is responsible for taking and recording donations. For the time period indicated, the VA estimates that only about $1249.00 worth of donations were received from AVRF. Those donations consisted mostly of snack baskets and a few books and games. There was no record of any type of medical equipment being provided.

I have reviewed the AVRF's tax return and financial statements for the tax year ended January 31, 1996, this is the same time period covered by the survey conducted by the VA. According to the documents I reviewed, AVRF's income for that year was at least $1,240,581.00. The amount of donations recorded by the VA for that year, $1249.00, is approximately one tenth of a percent of the amount of funds taken in by AVRF. This very meager amount contributed to VA hospitals leads me to believe that almost all the funds collected are being diverted to the personal use of the telemarketing companies and CHERNA.

MISREPRESENTATIONS TO THE COMBINED FEDERAL CAMPAIGN

In April 1997, I reviewed an Application for National Eligibility made by HHCF to the COMBINED FEDERAL CAMPAIGN, dated January 16, 1995. In the application, MARVIN CHERNA signs his name beneath several statements in the application, thereby certifying that the statements are true. In one of the statements CHERNA certified that HHCF permits no general telephone solicitation of the public, permits no payment of commissions, finders fees, percentages, bonuses, or similar practices in connection with its fund-raising practices.

Based on my review of the accountant work papers for HHCF as well as documents filed with various States by HHCF, I know that HHCF's primary means of raising funds is through telephone solicitation. I know that HHCF contracts with approximately 20 professional fundraisers, and that HHCF pays these fundraisers a percentage of at least 75% of the donations received.

I believe that this certification was made by CHERNA in order to induce the COMBINED FEDERAL CAMPAIGN to place HHCF on its list of organizations to receive donations. I know from my review of the bank accounts of HHCF that HHCF receives regular checks from numerous state chapters of the COMBINED FEDERAL CAMPAIGN.

Another certification made by CHERNA to the COMBINED FEDERAL CAMPAIGN is that neither he nor any other board member of HHCF receives any compensation. My review of the bank account of HHCF

reveals regular checks made payable to MARVIN CHERNA and at least one other board member of HHCF. These checks were deposited into the personal bank accounts of the payees.

DIVERSION OF FUNDS FOR PERSONAL USE

In my review of the bank accounts of HHCF and MARVIN CHERNA, I have noticed that several checks each month have been made payable to MARVIN CHERNA and deposited into the personal bank account of MARVIN CHERNA. In a three month period in 1995, I observed HHCF checks totaling about $3500.00 made payable to MARVIN CHERNA. In a four month period in 1995, I observed HHCF checks totaling about $11,800 made payable to a woman who has been identified to me as CHERNA's girlfriend. In a four month period in 1995, I observed checks totaling about $4400 payable to a board member of HHCF.

I have noticed other checks from the HHCF account that would appear to be for personal expenses, such as payments to THE UNIVERSITY CLUB. I have contacted a representative of THE UNIVERSITY CLUB and learned that it is a health and social club located in the GALLERIA SHOPPING CENTER, Dallas, Texas. According to an itemized ledger of expenses for HHCF for the period October 1, 1995, to September 30, 1996, the total amount paid by HHCF to THE UNIVERSITY CLUB was $7,260. I have reviewed itemized receipts from THE UNIVERSITY CLUB which reflect that the items purchased included meals, liquor, golfing green fees and massages. I have observed parked at 7610 Meadow Oaks Drive, Dallas, Texas, a vehicle with tag number WWY-21D. According to the TEXAS DEPARTMENT OF MOTOR VEHICLES, this tag pertains

to a 1997 Mercedes-Benz automobile which is registered to HHCF. Based on my review of the bank accounts of HHCF I believe that CHERNA and others are using the funds of HHCF to live a luxurious lifestyle and to pay personal expenses.

According to the tax returns for HHCF and AVRF, CHERNA and other officers and board members of HHCF and AVRF receive zero compensation. CHERNA also certified to the COMBINED FEDERAL CAMPAIGN on January 16, 1995, that he received zero compensation from HHCF. I have reviewed HHCF brochures that state that the officers and boardmembers of HHCF receive no compensation. I believe that HHCF misrepresents to donors that its officers and boardmembers receive no compensation so that donors will believe that most of their donation will be used to help hospitalized children.

EXISTENCE AND LOCATION OF EVIDENCE

I have reason to believe that HHCF and AVRF maintain records which constitute evidence of mail fraud and wire fraud at 7610 Meadow Oaks Drive, Dallas, Texas. I believe that HHCF and AVRF are still being operated at 7610 Meadow Oaks Drive, Dallas, Texas. JAMES PRINCE, a processor employed by DALLAS PROFESSIONAL CIVIL PROCESS, Dallas, Texas, advised that on April 18, 1997, he served legal papers on behalf of the State of Massachusetts to the AVRF at 7610 Meadow Oaks Drive, Dallas, Texas. A woman at that location identified herself as an employee of AVRF and accepted service of the papers. Furthermore, on May 2, 1997, I observed a Mercedes-Benz parked at 7610 Meadow Oaks Drive, Dallas, Texas, which is registered to

HHCF. On May 11, 1997, TU ELECTRIC Corporate Security advised me that the name on the electric account for 7610 Meadow Oaks Drive, Dallas, Texas, is HHCF. On May 14, 1997, I was advised by THOMAS EWBANK, CPA, that individuals from his accounting firm had been inside the residence located at 7610 Meadow Oaks Drive, Dallas, Texas, on February 13, 1997. At that time they observed two rooms which were set up as office space for HHCF and AVRF. They observed filing cabinets for the storage of records, minute books and a computer. EWBANK has reason to believe that HHCF and AVRF are still operating at that address since an auditor with his accounting firm is scheduled to meet with CHERNA on May 19, 1997, at 7610 Meadow Oaks Drive, Dallas, Texas.

I know from my training and experience as a Special Agent of the FBI that individuals in the normal course of business maintain books, records, receipts, notes files, bank records relating to their business.

I know that potential damage sometimes occurs if documents, records and other items of evidentiary value are removed, in bulk, from the storage cabinets or files in which they are maintained. Furthermore, the filing sequence and locations of the evidence in respect to other documents increases the significance and impact of a single seized document taken independently. I intend to maintain the integrity of the evidence by duplicating the environment in which the evidence was originally maintained. I request authority to seize any container, file box, filing cabinet, safe or other storage facility which exclusively contains items to be seized or other items authorized to be seized pursuant to this warrant.

I know that potential damage sometimes occurs if data of evidentiary value is removed from the computer on which the data is maintained. Downloading of the data can also be a time consuming technical process. I request authority to seize any computer equipment and software which are found within the subject premises.

LIMITATIONS OF SEARCH WARRANT

As previously noted, I have been told by Thomas Ewbank that CHERNA told him that part of the premises to be searched, 7610 Meadow Oaks Drive, Dallas, Texas is CHERNA'S residence. Ewbank stated that part of the premises is used by CHERNA to conduct his (CHERNA'S) business and part of the premises is where CHERNA lives.

To the extent practicable but so as not to limit the court's authorized search, I intend to search only the part of the premises apparently and obviously designated and used by CHERNA to conduct his business. However, items which I am authorized to search for and seize may be stored, as is typical in many businesses and homes, in other parts of the premises to be searched. If such items are found outside the primary area of the residence used by CHERNA to conduct his business, I request permission to seize the items pursuant to this search warrant.

On several occasions, I have discussed this case, the probable cause for the search, and the location to be searched with two Assistant United States Attorneys in Dallas, Texas. We have discussed the parameters of an "all documents" search warrant for a residence as set out United States v. Humphrey, 104 F.3d 65, 68-69 (5th Cir. 1997).

I believe that CHERNA'S entire business activities are merely a scheme to defraud. I am aware that some Attorney Generals from several states are investigating CHERNA for possible violations of the state civil fraud laws. I believe that CHERNA'S entire life is consumed by fraud and that all records found in the home will probably be subject to seizure pursuant to this warrant. I believe that all documents and records at the premises to be searched are likely to constitute evidence, either by directly showing the HHCF and AVRF scheme or by showing how CHERNA personally obtained and spent the fraudulently obtained money for his personal expenses. There is obviously considerable overlap of CHERNA'S personal life and business life.

CONCLUSION

Based on the above-mentioned facts, I have probable cause to believe that evidence of the crimes of Mail Fraud and Wire Fraud, in violation of 18, U.S.C., Sections 1341 and 1343, now exists at 7610 Meadow Oaks Drive, Dallas, Texas, further described in Attachment A. I request that a search warrant be issued for the premises described in Attachment A, authorizing a daytime search for the property described in this affidavit and in Attachment B.

/s/_____
Loretta Smitherman
Special Agent, FBI

Sworn to and subscribed before me this 19th day of May, 1997.

/s/_____
John B. Tolle
United States Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed October 1, 1998]
No. 3:98-072-T

UNITED STATES OF AMERICA	)	
	)	
v.	)	DALLAS, TEXAS
	)	
MARVIN CHERNA	)	July 1st, 1998
	)	

MOTION TO SUPPRESS
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: MICHAEL SNIPES
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UNITED STATES DEPARTMENT
OF JUSTICE
NORTHERN DISTRICT OF TEXAS
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Red Oak, Texas 75154-1247
214/617-8988

Proceedings reported by mechanical stenography, transcript produced by computer.

* * *

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MR. CLARY: No further questions. Thank you.

THE WITNESS: Thank you.

MR. SNIPES: No redirect, Your Honor.

THE COURT: The witness may step down.

MR. SNIPES: I call Agent Loretta Smitherman.

MR. SNIPES: Agent Smitherman, please step forward and be sworn.

THE COURT: If you will raise your right hand.

(Witness sworn by the court at 10:22 a.m.)

THE COURT: You may take the stand.

LORETTA SMITHERMAN, (Sworn)

DIRECT EXAMINATION

BY MR. SNIPES:

Q. Please state you name for the record, ma'am.

A. Loretta Smitherman.

Q. How are you currently, employed?

A. I'm a special agent with the Federal Bureau of Investigation.

Q. How long have you been employed in that manner?

A. Almost seven and a half years.

Q. What are your duties there, ma'am?

A. I'm assigned to a squad that investigates economic crimes, financial crimes.

Q. And are you the case agent assigned to the investigation of the case entitled United States versus Marvin B. Cherna?

A. Yes, I am.

Q. Were you also the affiant on an affidavit that accompanied an application for a search warrant before Judge Tolle on May the 19th, 19977

A. Yes, I was.

Q. And were you a participant in the execution of a search warrant at 7610 Meadow Oaks Drive, Mr. Cherna's residence?

A. Yes, I was.

Q. Okay. In fact, were you in charge of the search?

A. Yes.

Q. I'm showing you now what's been marked Government's Exhibit 1, it's already been admitted in evidence for purposes of this hearing, and I ask you if you will look at those signatures and ask if you recognize those?

A. Yes. Those are the signatures of the agents on my squad that assisted me with executing that search warrant.

Q. Were you in charge of in fact ensuring that those agents signed the back of the search warrant?

A. Yes. That was to indicate that they had read the affidavit.

Q. Why would that be important to you, ma'am?

A. That's FBI policy for agents to read the affidavit prior to participating in a search warrant just to ensure that they know exactly what we're looking for and understand a little bit about the case to help them identify evidence.

Q. Okay. Looking at the front of the search warrant itself, do you see there on the first page where it indicates that the magistrate is reviewing the affidavit as well as attachments A and B all as part of one document?

A. Yes, I do.

Q. In that regard, do you consider the search warrant and the application for the search warrant and the affidavit, the attachments, as all being incorporated as one document?

A. Yes.

Q. In fact, the search warrant appears to have been signed on May the 19th, 1997 by Magistrate Judge Tolle. Is that correct?

A. Yes.

Q. And the affidavit that's attached to the search warrant is also signed on May 19th by Judge Tolle. Is that correct?

A. Yes.

Q. All that was done concomitantly; that is, at the same time?

A. Yes.

Q. Now, ma'am, directing your attention to the actual body of the affidavit of the search warrant, on page 9 of the search warrant you have a -- affidavit actually -- you have a paragraph entitled Existence and Location of Evidence. Do you recall that being in your affidavit?

A. Yes.

Q. Would you tell the court what the purpose was of this, those particular provisions?

A. Well, that's -- that's always included in an affidavit for a search warrant. You have to tell the magistrate where the evidence is located because you have to have a specific location before you can get a search warrant approved. And you also have to give probable cause to believe that evidence is there at this present time.

Q. Is that to prevent a general rampaging of a person's home or business so that is a particularity as to the search?

A. Yes, it has to be at a particular place.

Q. And then I direct your attention to limitations of the search warrant. Do you recall that being in your affidavit?

A. Yes.

Q. Okay. And, in fact, there is some discussion -- some mention by you of some discussion with the Assistant United States Attorney Mike Uhl, who I believe was the prosecutor assigned to this case at the time of the search. What was the purpose of those discussions, ma'am?

A. Well, in my discussions with Assistant Uhl I questioned him as to whether I would be able to seize any personal records, personal financial records of

Mr. Cherna under the search warrant the way it was and we discussed that and we thought it would be appropriate to seize personal records because his personal finances were enmeshed with the finances of the two charities that he operated. So we had reason to believe that his personal finances would be evidence of mail fraud and wire fraud as well. And we -- I discussed that with Assistant Uhl and he looked up the case law that is cited here, the United States versus Humphrey, and he advised me that he believed it was appropriate.

Q. And, in fact, did your investigation in this case reveal that Mr. Cherna was actually taking charitable contributions and then using them for his own personal use?

A. Yes.

Q. And that is in part why you felt it necessary to have what's called an all records search at his home. Is that right?

A. Yes.

Q. Now, there are six agents that are listed on the back of that document. And in addition to that Government Exhibit 1, you yourself drafted the actual search warrant. Were there other people that were out there to do technical things, administrative duties to assist the agents?

A. Yes. We had a photographer there, we had two financial analysts who were in charge of entering the evidence into an computer data base inventorying. And then there was an investigative accountant there who helped load up the truck and move the boxes.

Q. The purpose for those persons being out there is for them to assist the agents once the evidence has been accumulated to make sure that it is properly accounted for, properly documented. Is that right?

A. Yes.

Q. They don't actually go into the house and actually execute the search warrant themselves, do they?

A. No, they didn't in this case.

Q. All right. And I think I may have asked you, but just to make sure, what's the purpose of ensuring all those people sign the back of the search warrant there, ma'am?

A. That's a way of making sure that I know that they have all read the affidavit.

Q. Okay. And did all the federal agents that participated in the execution of this search read the affidavit in this case?

A. Yes.

Q. And as far as the actual seizure of evidence, who was the person that was in charge of making the final decision as to whether or not evidence would be seized?

A. That was me.

Q. Okay. And are you the person that also produced an inventory recording those items that were seized on May the 20th?

A. Yes. Before we removed any evidence from the premises, I looked over everything. I looked over all the inventory sheets and actually signed the receipt to receive the inventory, the evidence.

Q. Were there in fact some items that were presented to you possibly being worthy of seizure that you decided to leave at Mr. Cherna's resident?

A. Yes. While the search warrant was being executed I roamed around to be available to all the agents and we discussed items. They would ask me questions and I would say, yes, we should take that or, no, we shouldn't take that particular item.

Q. Why would you maybe say, no, we shouldn't take that particular item?

A. Because I didn't want to take anything that wasn't of evidentiary value.

Q. And did you serve Mr. Cherna with any documents while you were out there on May the 20th, ma'am?

A. Yes. We gave him a copy of the search warrant and the attachments.

Q. Okay.

A. Attachments A and B.

Q. And once again I want to direct your attention to the front of the search warrant. And, in fact, it says on there, " and if the person or property be found there seized, leaving copy of this warrant and receipt for personal property and prepare a written inventory of the person's" . . . So you were basically following the instructions that Magistrate Tolle had given you. Is that correct?

A. Yes.

Q. All right. Now, just briefly, this is Government's Exhibit 2. Do you recognize that?

A. Yes.

Q. What is that?

A. That's the typewritten inventory of the evidence that we seized.

Q. Okay. Who prepared that?

A. One of the financial analyst who was out there with us.

Q. Was that done at your direction, ma'am?

A. Yes.

Q. And are you the person that actually returned this inventory?

A. Yes.

MR. SNIPES: And we would offer Government's Exhibit 2, Your Honor.

THE COURT: Any objection?

MR. CLARY: No objection.

THE COURT: Admitted.

MR. SNIPES: We pass the witness.

MR. CLARY: Your Honor, we're out of stickers. Could I mark on Defendant's Exhibit 1 and 2?

THE COURT: Yes. You need to put the case number on each sheet.

CROSS-EXAMINATION

BY MR. CLARY:

Q. Agent Smitherman, we have been talking about Government Exhibit 1, which is really a compilation of two separate documents, the search warrant and the application, affidavit for the search warrant. You have seen Government's Exhibit 1. Is that correct?

A. Yes, I have seen that exhibit.

Q. Now, that's a compilation of two separate documents, is it not?

A. It's several pages. There is the search warrant, the affidavit, and the attachments.

Q. Okay. And the only thing that was ever served on Marvin Cherna in connection with your execution of the search on May the 20th was the search warrant, the actual search warrant?

A. The search warrant and the attachments.

Q. The attachments being –

A. Attachments –

Q. -- a description of the property to be searched, attachment A, correct?

A. Uh-huh.

Q. And then also a description of the items to be seized, attachment B?

A. Yes.

Q. The affidavit -- I'm sorry.

A. I was going to say we left an inventory of the items we took.

Q. Okay. Let me show you what we have marked for identification as Defendant's Exhibit 11, and ask you to look at that document briefly?

A. (Peruses document.)

Q. Is that a search warrant and the return -- the inventory return that was filed with the court?

A. Yes.

Q. Okay. Your signature appears, I believe, on page 2, which is the certification -- the indication -- the certification for the inventory return. Is that correct?

A. Yes.

Q. Okay. And this is a typewritten -- the inventory return is a typewritten version of what was left with Mr. Cherna?

A. Yes.

Q. And the attachments A and B to which you refer in connection to the search warrant, those are the attachments that appear in Defendant's Exhibit 1. Is that correct?

A. (No response.)

Q. Attachment A and B that appear in Defendant's Exhibit 1?

A. Yes.

MR. CLARY: Your Honor, I offer Defendant's Exhibit 1 into evidence.

MR. SNIPES: No objection.

THE COURT: Admitted.

BY MR. CLARY:

Q. Agent Smitherman, let me show you what we have marked for identification as Defendant's Exhibit 2. That is the application and your affidavit for search warrant dated March 19th, is that correct, March 19th, 1997?

A. May 19th, yes.

Q. I'm sorry. May 19th, 1997?

A. Uh-huh.

Q. That's your signature on that document?

A. Yes. I don't see the attachments.

Q. Is this not a complete set of what you filed as the application and the affidavit?

A. Well, I don't actually file anything. I went to the judge and I had the application, of course, and the affidavit, which included the attachments A and B. And after the judge -- the magistrate reviews the affidavit and the attachments, then I get the search warrant.

Q. You had, if I understand correctly, Attachments A and B to the warrant, which we just looked at, Defendant's Exhibit 1, along with this affidavit of yours?

A. When I went to see -

Q. Magistrate Tolle?

A. Yes.

Q. Did Judge Tolle see anything else or review any additional evidence in connection with the issuance of this search warrant?

A. Other than the affidavit and the two attachments?

Q. Yes. Was there any oral testimony given?

A. No.

Q. Were there any other affidavits filed in support or tendered to him in support of the application for search warrant?

A. No.

Q. So there was only your single affidavit filed in support of the application for the search warrant?

A. Yes.

Q. All of the information that he had in front of him, as far as you know, was contained in that affidavit?

A. Yes.

MR. CLARY: Your Honor, I offer into evidence Defendant's Exhibit 2.

MR. SNIPES: No objection.

THE COURT: Admitted.

BY MR. CLARY:

Q. Agent Smitherman, the application and affidavit for search warrant, I want to make sure we're clear on this, was never shown to, served upon or left with the defendant, Marvin Cherna. Is that correct?

A. The application for search warrant?
Q. And the affidavit.

A. That's right.

Q. So he never saw the affidavit. All he saw was the search warrant and attachments A and B to the search warrant, correct?

A. Yes, that's correct.

Q. At the time the search was executed. Then at the conclusion the search warrant and inventory of the property seized was left with him?

A. Yes.

Q. Okay. So at the time the warrant -- you personally served warrants on Mr. Cherna, correct?

A. Yes.

Q. And you thought that at the time the search warrant was served on Mr. Cherna, the affidavit was not physically attached to the search warrant?

A. That's right. It was sealed.

Q. It was under seal and for that reason it was not served on Mr. Cherna?

A. That's right.

Q. Did you have an idea of what the premises at 7610 Meadow Oaks looked like before the search was executed?

A. Well, I certainly knew how the exterior looked because I had driven by there. I also had some testimony from people who had been inside.

Q. You knew that it served as both Mr. Cherna's personal residence as well as the location of the charities?

A. Yes.

Q. And did anyone describe to you in advance of the time that the search was conducted that the front two rooms of the premises served as an office space?

A. Yes.

Q. Okay. Did you limit your search to the office space?

A. To those front two rooms? No.

Q. Did you limit your search to the office space? Was there any additional portion of the premises that appeared to you to be obviously involved in the business of conducting a charities?

A. Yes. There were actually four rooms in the residence that were used as office space and the garage had also been converted into a telemarketing room and a storage room of records.

Q. So those portions of the premises, it was obvious to you that those were involved in the work of charities?

A. Yes.

Q. Were there any other rooms that were searched?

A. Yes. We searched the bedroom as well and we searched everywhere, the kitchen, the living room.

Q. Okay. In your affidavit you indicated that to the extent practicable that you would not conduct a search other than in areas that were designated used by Cherna to conduct his business?

A. Well -

Q. Do you recall that?

A. Yes. There is an additional paragraph or sentences there that states that people commonly might store records in closets or even under the bed and that we intended to search anywhere that records might be stored.

Q. So you did not -- what I'm trying to get at is you simply did not limit your scope -- the scope of the search in any way, you looked everywhere?

A. Yes.

Q. Even in his bedroom, even in other rooms that were -- at least from outward appearance, would give the notion that they were not used for business purposes?

A. Yes.

Q. Okay. You had indicated in your testimony that you believed that there was evidence that Mr. Cherna was using charitable funds for personal use?

A. Yes.

Q. Okay. And that you put some information in your affidavit regarding what you consider to be checks that were issued by Help Hospitalized Children's Fund to Mr. Cherna and Mr. Cherna's girlfriend. Do you recall that?

A. Yes.

Q. Did you have any information at all on American Veteran's Relief Fund, anything in your affidavit to show that Mr. Cherna had diverted any of those funds for his personal use?

A. I would have to review the affidavit. I don't remember whether I included checks from that charity.

Q. If you look at pages 5 through 7 you discuss American Veteran's Relief Fund. Let me see if I can save you some time. Is there a paragraph on page 7 where you indicated that you had reviewed the tax return for the period ending January 31, 1996 showing donations of $1,240,581?

A. Okay.

Q. And that during the same period of time a V.A. study had been conducted which indicated that only $1,249 had been donated to Veteran's Hospitals?

A. Yes.

Q. Do you recall that?
A. Yes.

Q. Did your conclusion that Mr. Cherna was using American Veteran's Relief Fund money for personal purposes stem solely from your comparison of the tax return of the Americans Veteran's Relief Fund or V.A. study?

A. No, I had -

Q. In your affidavit?

A. If I recall correctly, at the time I did the affidavit I had not received the American Veteran's bank records that I had subpoenaed from the bank, but I did have the records of Help Hospitalized Children's Fund.

Q. Yeah, but I just want to focus just on the American Veteran's Relief Fund at this point. And what I'm getting at is that at the time the affidavit was executed you did not have any evidence and none is included in that affidavit in which you demonstrated to Magistrate Judge Tolle that any of the funds were being diverted by Mr. Cherna for personal purposes?

A. I would say that the evidence was more that it wasn't being used for charitable purposes.

Q. Well, how do you know -- how did you draw that conclusion? Was it just from the V.A. study?

A. I had also reviewed -

Q. I want to focus -

A. -- annual reports -

Q. -- on what you put in the affidavit so that the magistrate had it.

A. Okay.

Q. Was there anything in the affidavit other than the V.A. study compared to the tax return to support your conclusion that Mr. Cherna was diverting funds for personal use?

A. I'm going to have to look over the affidavit for a moment.

Q. Okay.

A. (Witness peruses document)

I also mentioned in that affidavit on page 5 the that paragraph that I had reviewed contracts between the American Veteran's Relief Fund and telephone fund raisers and that

those contracts revealed that 75 to 80 percent of the funds were being paid to the telemarketers.

Q. My question was those were funds going to telemarketers, telemarketers to pay them for raising funds for the charity, correct?

A. Yes.

Q. Okay. My question is, what evidence did you have that funds were being diverted by Mr. Cherna to his personal use that you put in that affidavit other than the comparison of the tax return to the total donations reflected in the V.A. report?

A. That appears to be all that's included in the affidavit regarding the American Veteran's Relief Fund.

Q. Now, with respect to -- let's stay on American Veteran's Relief Fund for a moment. With respect to the evidence that you had of specific donations made to American Veteran's Relief Fund. As I recall the only specific examples that you provided in your affidavit were of Massachusetts doners?

A. Yes.

Q. Okay. You received materials from the State of Massachusetts and relied on that in putting your affidavit together?

A. Yes.

Q. The examples were just from that one state?

A. Yes.

Q. And they all involved one specific telemarketer, is that correct, Charitable Publications?

A. There was a telemarketer by the name of Charitable Publications that was soliciting funds in Massachusetts. I don't know if that was the only telemarketer that was soliciting Funds in Massachusetts.

Q. Okay. But all of the -- in connection with all the examples that you provided for Massachusetts, did you provide any examples where the individual had spoken directly with Marvin Cherna?

A. No.

Q. Now, I believe your affidavit indicates that AVRF would enter into contracts with telemarketers. And I think you just testified that telemarketers were paid for fund raising activity on behalf of AVRF.

A. Yes.

Q. And as far as you know, did the -- as set forth in your affidavit, did you provide any information to show that Mr. Cherna monitored what these individuals fund raisers were telling the prospective donors?

A. No.

Q. Okay. As far as you know, Charitable Publications or other telemarketers were really functioning independently, except to the extent that they had a contract with Mr. Cherna Is that correct?

A. Well, on page 5 there is some discussion of Mr. Cherna and the telemarketers acting in conjunction to set up -- intentionally set up local bank accounts to deposit donations with the intention of causing the donors to believe that the money they give is going to be used in their own communities.

Q. And -- but what I'm focusing on for the moment, do you have any indication that Mr. Cherna was supervising what was said by the telemarketers to the prospective donors? Leaving aside the fact that he may have assisted in setting up local bank accounts, do you know whether he monitored what they were saying to prospective donors?

A. Well, he provided the scripts that they used -

Q. Where is that in your affidavit?

A. Oh, you're asking -- oh.

Q. Yeah.

A. That's not in the affidavit.

Q. I want to what you gave to Magistrate Judge Tolle that led him to conclude that Mr. Cherna was involved

somehow in making misrepresentations that you attribute to the telemarketers here?

A. On page 3. No, I -- this is in relation to Help Hospitalized Children -

Q. Focus only on the American Veteran's Relief Fund at this point.

A. Okay. Then I can't find anything in our affidavit that says that.

Q. Okay. Did you also notice in the examples that you provided on American Veteran's Relief Fund where the individuals in Massachusetts had made donations that the donations were being picked up by courier?

A. Yes.

Q. What evidence did you put in your affidavit -- or what examples did you provide in your affidavit of money being picked up in Massachusetts that subsequently involved the mails at some point?

A. Well, the wires would have been used where these people were solicited by telephone to make donations.

Q. But you just testified that you had nothing in your affidavit to show that Mr. Cherna was involved in those representations.

A. (Witness peruses document.)

Q. Do you have an answer for me?

A. What's your question?

Q. I think my question is, do you have any basis for showing that mails were utilized in connection with any of the Massachusetts donations that you alleged were evidence that Mr. Cherna had been engaged in a conspiracy to commit mail fraud?

A. No.

Q. And you have already testified, I believe, that you have no evidence in your affidavit or no allegations in your affidavit to the effect that Mr. Cherna was involved in supervising any of the telemarketers that made representations to people in Massachusetts?

A. Yes, that's right.

Q. Agent Smitherman, did you put in your affidavit anywhere that Mr. Cherna had no alternative sources of income?

A. No.

Q. Did you know at that point in time whether he had alternative sources of income?

A. No.

Q. And I believe you testified you did not have any bank records relating to American Veteran's Relief Fund at the time the affidavit was executed?

A. That's right.

Q. Did you have personal bank records of Marvin Cherna at that point in time?

A. Yes.

Q. And did you have personal bank -- did you have the bank records that Help Hospitalized Children Fund at that point in time?

A. Yes.

Q. Now, the bank records that you had of Help Hospitalized Children's Fund, for what period of time did you have those records?

A. (No response.)

Q. If you recall.
A. For most of 1995.

Q. Okay. And was that the only -- you had just 1995, you did not have any later years?

A. At that time, no.

Q. And in 1995 I believe you identified a five-month period and a three-month period where you saw transfers from the Help Hospitalized Children's Fund to Mr. Cherna and to his girlfriend that you considered to be indicative of personal diversion of funds?

A. Yes.

Q. How do you know that those payments were not reimbursements for funds that Mr. Cherna had extended on behalf of the charities? How did you know that?

A. Because I didn't see any checks from his personal account that looked like anything other than personal expenses.

Q. So you drew that -- is that set forth in the affidavit anywhere?

A. No.

Q. Of the total -- and throughout your affidavit in the entire affidavit the only specific allegations that I recall that you make with respect to personal diversion of funds would be Help Hospitalized Children's Fund being diverted to Mr. Cherna and to his girlfriend and to a director. Is that correct?

A. Yes.

Q. As I recall, the total is approximately $20,000 that you were able to come up with?

A. Okay. Yes.

Q. Does that appear to be correct?

A. For that three-month period or

Q. Three month and five-month periods?

A. Yes.

Q. My first question there is, why did you select those particular periods?

A. Because that's what I had bank records for.

Q. You had no banks records for other than the three-month period and the five-month period referenced in the affidavit?

A. I don't remember now. I had -- I didn't have extensive banks records at the time I prepared the affidavit.

Q. Okay.

MR. CLARY: Your Honor, may I take just a second?

THE COURT: You may.

BY MR. CLARY:

Q. Agent Smitherman, on page 2 of your affidavit at the top it says that you have reviewed bank account records for HHCF, AVRF and Cherna?

A. Okay.

Q. And your testimony today was that you did not have the AVRF records at the time you executed your affidavit?

A. The accountant had some of the AVRF records and I had reviewed those.

Q. So you had reviewed them at the accountant's office, but you didn't have them in your possession?

A. Yes.

Q. Okay. So when you're telling us you did not have the AVRF record at the time you executed the affidavit, you mean in your physical possession?

A. Yes.

Q. You did have access to the records?

A. Yes.

Q. And yet there is nothing in the AVRF analysis which would indicate that any AVRF funds were specific examples where the AVRF funds, in your review, were diverted to Mr. Cherna and his girlfriend?

A. That's not included in the affidavit.

Q. Did you draft the affidavit yourself?

A. Yes.

Q. You had assistance from the U.S. Attorney in doing that?

A. Yes.

Q. Okay. Mr. Uhl?

A. Yes.

Q. Wouldn't it have been possible, in your view, to limit the scope of the search, at least by date, to specify a date, cutoff for documents that should be seized here?

A. (No response.)

Q. I don't see any date restriction whatsoever in the search warrant here.

A. We usually don't -- it didn't occur to me to restrict the date, and Assistant Uhl didn't bring it up.

Q. Can you describe for me a single item -- I mean, in your affidavit I believe that you specify that you believe that Mr. Cherna's entire life was consumed by fraud. Is that correct?

A. Yes.

Q. And it's based on what you have put in your affidavit?

A. Yes.

Q. And based upon that you secured issuance of this search warrant. Can you describe for me a single item contained in 7610 Meadow Oaks that could not have been seized under the terms of this warrant?

A. (No response.)

Q. I'm happy to have you look at Defendant's Exhibit 1, the warrant.

A. (Witness peruses document)

There were certainly items including document items that we didn't seize and whether I can go back and describe those now will take some thought.

Q. That's not my question. You said that you didn't seize. But what I want to know is, did you have, under the terms of this warrant, the discretion to seize virtually everything at 7610 Meadow Oaks?

A. No, I don't think so.

Q. Can you name one item that you could not seize?

A. We wouldn't have been able to seize personal financial records of Gloria Miller, I don't believe.

Q. Well, in your affidavit -- didn't you put in your affidavit that Ms. Miller, who is Marvin Cherna's girlfriend -- I believe that's the girlfriend you reference. Is that correct?

A. Uh-huh.

Q. Did you put in there that she had received transfer of funds from Help Hospitalized Children's Fund?

A. Yes.

Q. And wouldn't that -- wouldn't her financial records -- isn't that where you got that information from?

A. Got what information from?

Q. Her financial records.

A. No, we got those from the records of Help Hospitalized Children's Fund.

Q. So in terms of the warrant, wouldn't her financial records be related to mail fraud, wire fraud set forth in your affidavit?

A. Perhaps.

Q. That would have been a -

A. I don't know that we specifically asked permission to seize -- I don't see in here where we put that on the list of items to be seized.

Q. Okay. Could you read attachment B?

A. That's what I'm looking at.

Q. Okay. If you look at the first page, the lead-in paragraph, Records and items related to fraud by wire and mail fraud as described in the affidavit of FBI Agent Loretta Smitherman within the premises 7610 Meadows Oaks Drive, Dallas, Texas, including but not limited to the following.

A. Okay.

Q. Do you see that?

A. Uh- huh.

Q. That's what that warrant authorized. Isn't that correct?

A. Everything that relates to mail fraud and wire fraud.

Q. As described in your affidavit?

A. Okay. Yes.

Q. Can you think of one thing that wouldn't relate to it? If his entire life is consumed by fraud, wouldn't everything inside 7610 Meadow Oaks, based upon your affidavit, be subject to seizure under the terms of that warrant?

A. Photographs of his children wouldn't be seized, you know, religious materials. You want me to make up a list of things that wouldn't be seized?

Q. No. I think -

A. Anything that didn't have to do with fraud wouldn't be seized.

Q. But the question I have is, how would you draw the line if he paid for the camera that took those pictures, paid to develop -- cost of those picture with the proceeds of charitable donations, you could seize anything under the terms of this warrant.

A. No, only things that had to do -- that were evidence of mail fraud and wire fraud.

Q. Okay. As set forth in your affidavit?

A. Yes.

Q. And your affidavit just -- I'm going to make this very clear, was never given or supplied to Mr. Cherna?

A. That's right.

Q. So he had absolutely no way to determine what the scope of your search would ultimately be?

A. No, he did because I gave him the attachment B that is entitled Property to be Seized.

Q. Which describes the property seized to be records and items related to fraud by wire fraud and mail fraud as described in your affidavit, which was not supplied to him?

A. Yes. But then there are -- there is several pages describing the items that will be seized.

Q. Well, are those all of the items that will be seized? Your paragraph -- your lead-in paragraph to attachment B says including but not limited to the following.

A. It's -

Q. Doesn't that provide you with the discretion to determine precisely what relates to mail fraud or wire fraud?

A. Yes. In case I neglected to put something in important on the list and I found an important piece of evidence, I wouldn't want to be precluded from being able to seize it.

Q. Exercise discretion on site to seize that item?

A. Yes.

Q. Did you know -- either you made the allegations in the affidavit that Mr. Cherna was not or that Help Hospitalized Children's Fund was not a member of Child Guidance Counsel. Do you recall that?

A. I do. Let me find the page that that's on. It's right here on page 2.

Q. Did you know that Mr. Cherna himself, individually, was a member of that organization at the time this affidavit was signed?

A. Let me look. That is not on page 2 after all -- oh, wait. Yes, it is. No, I interviewed a lady -- actually the agent that was assigned to this case before I was, Elaine Shaw, interviewed Marsha Cooper with the Child Life Counsel who told us that Help Hospitalized Children's Fund was not -- never had been a member of the Child Life Counsel and that they didn't have permission to use the name of Child Life Counsel in its brochures.

Q. Okay. Did you also inquire as to Mr. Cherna, or did she tell you that Mr. Cherna was a personal -- individual member of that organization?

A. No.

Q. Did you in fact seize photographs at 7610 Meadow Oaks Road?

A. Yes, we did.

Q. Were those some of the photographs of Mr. Cherna's children?

A. Yes.

Q. You testified on direct, Agent Smitherman, that there were a number of additional individuals in addition to agents who were on site --

A. Yes.

Q. -- who were assisting in and executing the search. Did they read the affidavit and search warrant?

A. I don't know because they didn't -- they weren't going to be participating in seizing evidence, so I didn't -- I didn't instruct them to read it. They may have read it.

Q. You had the affidavit out in your car. Is that right?

A. Yes, it was in my car.

Q. It was in your car. It was not brought into the house at any time?

A. No.

Q. Okay.

A. But they could have read it back at the office.

Q. Okay. Would it have been your procedure to require them to sign the affidavit if they had in fact read it?

A. No. I was only interested in having the individuals who were going to actually participate in identifying evidence to be seized to sign the affidavit.

Q. So your testimony is that none of the people -- other than the six that were listed as signatories on the back of Government's Exhibit 1, nobody else participated in the actual search and seizure of evidence?

A. No.

Q. That is not your testimony or that is?

A. That is my testimony.

Q. Okay. So the other people were there just in -- they didn't look at the substance of any of the evidence?

A. Not for the purpose of identifying the evidence to be seized.

Q. Well, who was making the decision as to what photographs to take?

A. You mean the photographs that the FBI takes when we first enter a place, or are you talking about the photographs that we seized?

Q. Well, I'm talking about the photographs that the FBI takes of the interior. Who makes the decision as to who -

A. We have a photographer that photographs everything.

Q. Okay. Everything in the interior?

A. Yes.

MR. CLARY: All right, Your Honor, I pass the witness.

MR. SNIPES: No redirect, Your Honor.

THE COURT: The witness may step down.

MR. SNIPES: That's all the evidence we have, Your Honor.

THE COURT: Anything further, Mr. Clary?

MR. CLARY: No, Your Honor, that' all the evidence we have.

THE COURT: All right. Would you like to argue?

MR. CLARY: Yes, Your Honor I would.

THE COURT: All right.

MR. CLARY: Your Honor, I have looked at the cases and filed an extensive brief in connection with this matter.

THE COURT: The court has reviewed the brief.

MR. CLARY: I don't want to belabor the point. I think the court probably has understood the point we are making here.

This is a general warrant. There is case directly on point out of the Ninth Circuit that says where you have got a search warrant of this nature that is general in scope, that provides for absolute exercise of discretion on the part of the executing officers, that there is a possibility that the scope can be narrowed through the attachment of an affidavit, but if the affidavit is not at least in the -- served on the defendant or left on the premises, I haven't found a single case in that context

that allows the search warrant to be narrowed by the affidavit.

This is an unconstitutional general warrant. All of the evidence ought to be suppressed. And there is simply no good faith argument, the Ninth Circuit addressed that in the McGrew case, the affidavit is not attached if it's not served on the defendant, there is no argument that the good faith exception to the exclusionary rule should be applicable.

I think the evidence here is overwhelming that the agents had the ability to exercise absolute discretion. That's precisely what the Fourth Amendment was designed to prohibit.

And in this particular case the warrant -- it's about as broad a warrant as anybody could conceive of.

I don't believe there is a single item at 7610 Meadow Oaks that could not have been seized. It was just a blanket authorization to conduct the search on the premises and to seize whatever you happened to find there for whatever purposes.

And that's the gist of our argument, Your Honor. And if the court has any questions that you would like to put to me, I would be happy to address them. But I think our point to clear.

THE COURT: Mr. Snipes.

MR. SNIPES: Just briefly.

Your Honor, the government disagrees with Mr. Clary's argument, and we also stated most of what our position in our brief.

Just to reiterate to the court, I think the Kelly case is particularly persuasive, 140 F 3rd 602, where it says a warrant that does not satisfy the particularity or requirement akin to unsigned or undated both are technical in nature.

The point being that the good faith exception does apply, and that these federal agents participating in this case acted reasonably and in good faith on issuance of the warrant for Magistrate Tolle.

Beyond that, the Kelly case also says at page 596 that a warrant can be made valid with the insertion of the phrase "see attached affidavit."

That occurred in this case. There is no hyper technical requirement that it be served on the defendant, that it be -- physically be attached to the warrant when it's served on the defendant or anything of that sort whatsoever.

The question that you're looking at and what you're trying to do whenever you do a valid search warrant on a Fourth Amendment is did the agents know what they were searching for and did they take reasonable steps to ensure that.

A general warrant did not take place. I think the agents did that in this case. I don't think there is any problem whatsoever with this warrant that's issued. It's clear that AUSA Uhl and Agent Smitherman took pains to ensure this

would not be a general warrant. I think it's valid under the Fourth Amendment.

Thank you, Your Honor.

THE COURT: All right. The court, after reviewing the warrant, the attachments to the warrant and the affidavit to the warrant, finds that the affidavit is sufficient to show probable cause for issuance of a search warrant.

Further, the court finds that attachment B to the warrant is -- sets out 26 items with sufficient particularity for the description of the items to be seized to remove the warrant from the purview of prohibition of general warrants.

The commission of fraud usually involves secrecy and deception. Therefore, it's virtually impossible to provide the exact descriptions of the items to be seized.

Also, fraud commission by the use of telemarketing schemes usually follows the pattern of use of scripts provided to the telephone operators, misrepresentation as to what use will be made of funds collected and it's seldom known precisely what items would be or have been fraudulently purchased or paid for by the funds collected.

Therefore, in the investigation of fraud cases it is generally difficult, if not impossible, to discover the precise method and instrumentality used in perpetrating the fraud.

For that reason, the court finds that the officers executing the warrant acted in good faith and the motion to

suppress is denied and the court will follow with the written order of the court's findings.

All right. The court will be in recess.

MR. SNIPES: Your Honor, can I ask you one question. Are we now set for rearraignment tomorrow at 1 p.m.? I believe we are.

THE COURT: At one? I didn't know the time.

MR. CLARY: I believe that is correct.

THE COURT: All right. One o'clock will be fine.

MR. SNIPES: Should be regular docket time, Your Honor.

THE COURT: It is. I don't know what else is set at that time, so we'll get to you as soon after one as we

* * *

CERTIFICATION

I, P. SUE ENGLEDOW RPR/CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 30th day of September, 1998.

/s/_____
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Supreme Court, U.S.
FILED
MAR 8 2000
CLERK

(2)

No. 99-971

In the Supreme Court of the United States

MARVIN CHERNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the evidence seized in a warrant-authorized search of petitioner's home, which was also the site of two fraudulent businesses petitioner operated, was admissible pursuant to the good-faith exception to the Fourth Amendment exclusionary rule.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 184 F.3d 403. The opinion of the district court (Pet. App. 24a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1999. A petition for rehearing was denied on September 8, 1999 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on December 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motion to suppress evidence, petitioner entered a conditional plea of guilty in the United States District Court for the Northern District of Texas to one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 48 months' imprisonment, to be followed by a three-year term of supervised release, and fined $12,500. The court of appeals affirmed. Pet. App. 1a-23a.

1. Petitioner was the executive director of the Help Hospitalized Children's Fund (HHCF) and the American Veterans' Relief Fund (AVRP), two charities based in Dallas, Texas. Petitioner solicited funds for the two charities, which he operated out of his home, and then converted the contributions he received to his own use. Pet. App. 2a, 10a-11a.

a. Petitioner, using professional fundraisers, solicited donations for HHCF by representing that the money would benefit hospitalized children in the donor's community, and that part of the donated money would be spent to send terminally or chronically ill children and their families to Walt Disney World through another organization called Give Kids the World. HHCF brochures sent to potential donors represented that HHCF was a member of certain prestigious charitable organizations, such as the Child Life Council; that petitioner and other HHCF board members served without compensation; and that all of the funds solicited went to the charity, which spent approximately 20% of the funds raised to cover administrative costs. Further, HHCF induced the Combined Federal Campaign to place HHCF on its list of organizations to receive donations for the year 1995 by stating on its application that HHCF did not permit general

telephone solicitation of the public or the payment of commissions in connection with its fund-raising practices and that neither petitioner nor any other HHCF board member received any compensation. Pet. App. 40a-43a, 50a.

An FBI investigation revealed that HHCF was not a member of either Child Life council or Give Kids the World; neither organization had received any financial support from HHCF, and HHCF had never sent any children to Walt Disney World through Give Kids the World. Further, while HHCF set up numerous local bank accounts and post office boxes throughout the United States in order to lull donors into believing the money they pledged was being spent in their community, the donors' local hospitals had never heard of, and did not receive any donations from, HHCF. Instead, the funds were deposited in local banks and then transferred to accounts in Dallas. Moreover, although brochures sent to potential donors in Illinois bore the logo of a local hospital, that hospital had not given permission for HHCF to use its logo and had never received any donations from HHCF. Further, HHCF paid professional fundraisers a percentage of at least 75% of the donations received as commissions. Pet. App. 10a, 41a-46a,

b. Similarly, individuals solicited to make donations to AVRF were told that their donations would benefit local veterans' hospitals, and would be used to purchase wheelchairs, crutches, and other medical supplies for hospitalized veterans. Although AVRF's reported income for the tax year ending January 31, 1996, was $1,240,581, a survey of all VA hospitals in the United States for that period revealed that VA hospitals received only about $1249 in donations from AVRF. These donations consisted mostly of snack baskets and

a few books and games; there was no record of any type of medical equipment being provided. Pet. App. 47a-49a.

c. A review of HHCF's and petitioner's bank records revealed that during a three-month period in 1995, HHCF issued several checks totalling $3500 that were made payable to petitioner; during a four-month period in 1995, HHCF issued checks totaling $11,800 to petitioner's girlfriend and checks totaling $4400 to HHCF board members. From October 1995 to September 1996, HHCF made payments totaling $7260 to a health and social club in Dallas for meals, liquor, golfing green fees, and massages. Pet. App. 50a-52a.

2. On May 19, 1997, the FBI applied for a warrant to search petitioner's business and residence, both of which were located at 7610 Meadow Oaks Drive in Dallas, Texas. The affidavit in support of the application, and which was attached to it, outlined in detail the scheme described above. That information was compiled from interviews with witnesses; reviews of complaints filed with local Better Business Bureaus and State Attorney Generals' offices; HHCF and AVRP bank account records, tax returns, and financial statements; certifications made by petitioner to the CFC; and documents filed by petitioner with various States for the purpose of registering HHCF and AVRF to raise funds. See Pet. App. 40a. The affidavit recited that there was reason to believe that HHCF and AVRF were still being operated out of petitioner's residence because accounting firm employees on February 13, 1997, had observed two rooms at that address set up as offices for HHCF and AVRF, and an auditor was scheduled to meet with petitioner there on May 19, 1997, the date the warrant was executed. The affidavit further recited that a woman identifying

herself as an AVRF employee had accepted service of process at petitioner's home on April 18, 1997, and that the electric account for the residence was listed in HHCF's name as of May 11, 1997. *Id.* at 11a, 52a-53a.

The warrant application referred to two documents: Attachment A, which set forth the place to be searched, and Attachment B, which described the evidence to be seized. Attachment A stated that the HHCF and AVRF offices were located at 7610 Meadow Oaks Drive in Dallas, and included "all rooms/parts of the residence and the attached garage." Pet. App. 2a, 32a. Attachment B described the evidence subject to seizure as "Records and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman, within the premises [of] 7610 Meadow Oaks Drive, Dallas, Texas, including, but not limited to the following, however maintained," followed by a list of 26 categories of evidence, primarily written and electronic documents. *Id.* at 33a-36a. Category 26 consisted of "[r]eceipts o[r] other documentation of the purchase, of items of value, such as jewelry, electronic equipment, vacation packages, automobiles, etc. indicative that [petitioner] spent the money he obtained fraudulently on personal expenses and personal items." *Id.* at 36a.

The search warrant was executed under the direction of the affiant, Agent Smitherman. Before the search, the six FBI agents executing the warrant were required to read the warrant, the accompanying documents, and the affidavit. Petitioner was given a copy of the warrant and Attachments A and B. He was not shown a copy of the affidavit because it had been placed under seal; the affidavit, however, was present in Smitherman's vehicle throughout the search. Upon entering the premises, the agents determined that four

rooms were being used as office space, and that the garage had been converted into a telemarketing and record storage room. The agents did not limit their search to those rooms, but also searched all areas in the residence where records might be stored, including the bedroom, kitchen, and living room. Pet. App. 3a.

3. The district court denied petitioner's motion to suppress the items seized during the search. Pet. App. 24a-27a. The court found that the affidavit established probable cause for the issuance of the warrant, and that Attachment B to the warrant "set[] out with sufficient particularity twenty-six types of items to be seized so as to remove the warrant * * * from the purview of the prohibition of a general warrant." *Id.* at 26a. In the alternative, the court found that the officers executing the warrant "acted in good faith and in reasonable reliance upon the warrant's validity, thereby avoiding the Fourth Amendment's exclusionary rule." *Id.* at 25a.

4. The court of appeals affirmed. Pet. App. 1a-23a. Employing the two-step process set forth in *United States* v. *Lampton*, 158 F.3d 251, 258 (5th Cir. 1998), cert. denied, 525 U.S. 1183 (1999), the court declined to reach the issue of the warrant's validity, because it determined that the evidence seized thereunder was admissible under the good faith exception to the exclusionary rule established in *United States* v. *Leon*, 468 U.S. 897 (1984). The court found no evidence to show that the issuing magistrate had abandoned his role as a neutral and detached judicial officer. Pet. App. 8a. The court also held that, even though the warrant essentially authorized an "all records" search of petitioner's home, probable cause for such a broad search was not so lacking as to "render official belief in its existence entirely unreasonable." *Id.* at 10a. Summarizing the evidence set forth in Agent Smitherman's 11-page

affidavit, and referring to Smitherman's conclusions that petitioner's business activities were "merely a scheme to defraud" and that there was considerable overlap between petitioner's personal and business lives, the court held that the affidavit "was not so 'bare bones' as to render all belief in the existence of probable cause for an all records search unreasonable." *Id.* at 11a-12a. Rejecting petitioner's claim that the affidavit was based on stale information dating from one to two years before the application for the warrant, the court stated that "in light of the facts that HHCF and AVRF were ongoing businesses and that financial records typically are retained for long periods of time, we cannot say that Smitherman's affidavit was based on stale information." *Id.* at 12a.

The court also held that the warrant was not so lacking in particularity that the executing officers could not reasonably have relied on it. Pet. App. 13a-19a. The court rejected the contention that reliance on the warrant was unreasonable because the warrant authorized the seizure of records related to wire and mail fraud as described in the affidavit. The court explained that the issuing judge had made a probable cause determination, the affidavit explained in detail the particular fraudulent scheme of which evidence was sought, the officer in charge of the search was the affiant, and the other FBI agents who participated in the search had read the affidavit prior to the search. The court reasoned that, as in *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), any defect in the warrant occasioned by the absence of the affidavit "could have been remedied with only minor corrections, such as the attachment of the affidavit." Pet. App. 16a. Thus, the court did not reach the issue of whether the warrant was in fact invalid because the affidavit was not

attached to it, instead concluding that "[a] reasonable executing officer, relying on the magistrate judge's issuance of the warrant and sealing of the affidavit, could have believed that the reference to the affidavit and the rather lengthy list that followed satisfied the Fourth Amendment's particularity requirement." *Id.* at 17a.

Finally, the court rejected petitioner's claim that the evidence at the suppression hearing established the absence of good faith on Agent Smitherman's part. Petitioner had claimed that Agent Smitherman could not have been acting in good faith because she drafted Attachment B to contain the "including, but not limited to" language that petitioner claimed authorized a general search. See Pet. App. 33a. Agent Smitherman, however, testified that the warrant authorized the seizure only of evidence related to mail and wire fraud as described in the affidavit, and that "[w]hile she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence, she apparently also believed that Attachment B adequately identified the scope of her search." *Id.* at 22a.

In sum, the court upheld the warrant under the good faith exception to the exclusionary rule because it found that the officers in this case took every step that could reasonably be expected of them:

> Smitherman prepared a detailed affidavit that was reviewed by two Assistant United States Attorneys. She then presented the affidavit to a neutral magistrate judge, who found it sufficient to support probable cause to search [petitioner's] residence and issued a warrant authorizing such action. Although he sealed the affidavit, the warrant referenced it and contained a list of twenty-six

> categories of evidence subject to seizure. All the officers participat[ing] in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search. Our law simply does not require a reasonable officer to do more.

Pet. App. 23a.

ARGUMENT

The court of appeals' decision declining to suppress the evidence in this case is correct and does not conflict with any decision of any other court of appeals. Further review of the judgment in this case is therefore not warranted.

1. Petitioner contends (Pet. 18-19) that the Fifth Circuit's holding that the officers could have relied in good faith on the warrant conflicts with the Ninth Circuit's decision in *United States* v. *McGrew*, 122 F.3d 847 (1997). In petitioner's view, the Ninth Circuit in *McGrew* held that the officers in an analogous situation could not have reasonably believed that the warrant itself was not overbroad, and they could not rely on an unattached affidavit to narrow the scope of the warrant. Petitioner's contention is mistaken.

First, there was a substantially stronger basis for the officers' good-faith belief in the validity of the warrant in this case than in *McGrew*. The warrant in *McGrew* did not itself identify the suspected crimes and it did not specify the evidence to be seized; instead, it purported to "incorporate" an "attached affidavit" that the issuing magistrate sealed. 122 F.3d at 849. The government, however, "offered no evidence that the affidavit or any copies were ever attached to the warrant or were present at the time of the search," and it was "highly questionable" that "the agents [who conducted the search] were aware of the contents of the

affidavit." *Ibid.* The Ninth Circuit held that the agents could not claim good faith reliance on the affidavit's contents, when the affidavit did not accompany the warrant. 122 F.3d at 850. Here, by contrast, the warrant had far more detail than the warrant in *McGrew*, since it described 26 categories of items that were subject to seizure and stated that those items were related to the specific mail and wire fraud offenses that were described in the affidavit.[1] Moreover, the evidence showed that the affidavit had been attached to the warrant, that the agents who conducted the search had read the warrant and affidavit, and that the

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[1] Petitioner asserts that "[t]he unconstitutional breadth of the Warrant is exacerbated in this case by the fact that both the Warrant and the Smitherman Affidavit reference the amorphous crimes of mail fraud and wire fraud." Pet. 13. The warrant did not, however, merely refer to "amorphous crimes" by reference to their statutory citations. Instead, it referred to "Fraud by Wire and Mail Fraud *as described in the affidavit*." Pet. App. 33a (emphasis added). In that respect, this case differs substantially from cases cited by petitioner (Pet. 13-14) in which courts have held that a broad reference to a federal offense by its statutory citation is insufficient in some circumstances to satisfy the Fourth Amendment's particularity requirement. For example, in *United States* v. *Leary*, 846 F.2d 592, 601 (10th Cir. 1988), the warrant permitted a search for any document showing a violation of two general federal statutes. In *United States* v. *Spilotro*, 800 F.2d 959, 964-965 (9th Cir. 1986) (Kennedy, J.), the only limitation on the warrants was that the items seized be evidence of a violation of any one of 13 statutes. See also *United States* v. *George*, 975 F.2d 72, 75-76 (2d Cir. 1992) (holding overbroad a warrant that did not mention a particular crime or statutory provision at all, but instead authorized seizure of a number of specific items and "any other evidence relating to the commission of a crime").

affidavit was present at the scene of the search. Pet. App. 3a.[2]

Second, the Ninth Circuit's rejection of the good faith argument in *McGrew* was based in substantial part on that court's view that the officers should have known of the warrant's alleged defects because it had been "[t]he well settled law of this circuit" that "a search warrant may be construed with reference to the affidavit" only if the affidavit is physically attached to the warrant. 122 F.3d at 849. In this case, the Fifth Circuit noted that "it is not entirely clear from circuit precedent that the affidavit must be physically attached to the warrant or served on the defendant." Pet. App. 17a. Accordingly, even under the reasoning of *McGrew*, the agents in this case had an objectively reasonable basis to believe that the warrant was valid.

2. Petitioner contends (Pet. 25-27) that this case falls within the exception to the *Leon* good-faith exception applicable in cases in which the magistrate has "fail[ed] to manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application." *Leon*, 468 U.S. at 914 (internal quotation marks omitted; citing *Lo-Ji Sales, Inc.* v. *New York*, 442

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[2] Petitioner contends that other FBI personnel who accompanied the agents "were clearly involved in seizing the evidence" but had not been instructed to read the warrant and the affidavit. Pet. 5 n.5. As the court of appeals stated, however, the agents who executed the search warrant "were required by FBI policy to read the warrant, the accompanying documents, and the affidavit prior to participating in the search." Pet. App. 3a. See also *id.* at 23a ("All the officers [that] participated in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search."). It was therefore of no consequence "whether several other FBI employees who assisted in the search but did not participate in seizing evidence read the affidavit." *Id.* at 3a.

U.S. 319, 326-327 (1979)). The Fifth Circuit, however, concluded, "[a]fter carefully reviewing the record, * * * that there is no evidence that the issuing magistrate * * * abandoned his role as a neutral and detached judicial officer." Pet. App. 8a. That conclusion was correct, especially in light of the fact that, as the court of appeals noted, "[petitioner] does not so much as allege that [the magistrate judge] was biased." *Ibid.* Indeed, petitioner's sole contention on this point (Pet. 26-27) is that the magistrate authorized a warrant that petitioner asserts was in fact invalid. That is obviously insufficient to establish that the magistrate has abandoned his judicial role, as this Court's decisions in *Leon* and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), establish. In any event, further review of the court of appeals' fact-bound conclusion that petitioner failed to show that the magistrate had abandoned his judicial role would be unwarranted.[3]

3. Petitioner also asserts (Pet. 27-29) that the court of appeals' holding that the good-faith exception was applicable in this case conflicts with this Court's decision in *Sheppard*. As the court of appeals noted (Pet. App. 22a-23a), however, this case is supported by *Sheppard* because in both cases, "[t]he officers * * * took

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[3] The Fifth Circuit's decision does not conflict with the Eighth Circuit's conclusion that the magistrate in *United States* v. *Decker*, 956 F.2d 773, 777 (1992), had abandoned his duty by "act[ing] as a rubber stamp". In *Decker*, "the issuing judge signed the warrant without reading it and * * * failed to note both that the prosecutor had not signed the warrant [as required by state law] and that the warrant did not list the property to be seized." *Ibid.* In this case, by contrast, there was no evidence that the magistrate had failed to read the warrant, that the warrant lacked a required signature, or that the warrant did not list the property to be seized.

every step that could reasonably be expected of them." The court of appeals explained:

> Smitherman prepared a detailed affidavit that was reviewed by two Assistant United States Attorneys. She then presented the affidavit to a neutral magistrate judge, who found it sufficient to support probable cause to search [petitioner's] residence and issued a warrant authorizing such action. Although he sealed the affidavit, the warrant referenced it and contained a list of twenty-six categories of evidence subject to seizure. All the officers [that] participated in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search.

Id. at 23a. For those reasons, this Court's conclusion in *Sheppard* that the evidence should not be suppressed is equally applicable here.

Petitioner attempts to distinguish *Sheppard* by claiming (Pet. 28) that Agent Smitherman, in contrast to the officers in *Sheppard*, "intentionally sought unfettered discretion to seize virtually any item located on the target premises." That, however, is a mischaracterization of Smitherman's testimony. The court of appeals quoted the pertinent testimony at length, Pet. App. 19a-22a, and it concluded that although the testimony "is sometimes equivocal," Smitherman "did not admit that she had drafted the warrant to give her complete discretion to seize any item she wished." *Id.* at 22a. The court noted that Smitherman instead had "stated repeatedly that the warrant authorized the seizure only of evidence related to mail and wire fraud as described in her affidavit." *Ibid.* Although "she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence, she

apparently also believed that Attachment B [the description of the items to be seized] adequately identified the scope of her search." *Ibid.* Just as in *Sheppard*, the evidence here showed that the officer sought a warrant that she believed would be constitutionally valid. The court of appeals' decision that the good-faith exception applies here is therefore supported by—and certainly does not conflict with—this Court's decision in *Sheppard*.

Petitioner also appears to suggest (Pet. 28) that the Fifth Circuit's ruling in this case conflicts with the Ninth Circuit's decision in *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747, 753 (1989). The warrant in this case, however, did not have the features that made the Ninth Circuit hold the warrant in *Center Art Galleries* to be so defective that it could not support a good-faith belief in its validity. The warrant in *Center Art Galleries* provided for the "almost unrestricted seizure of items which are 'evidence of violations of federal criminal law' without describing the specific crimes suspected." *Id.* at 750. Here, by contrast, the warrant stated that the items to be seized related to specific instances of wire and mail fraud as described in the affidavit and listed 26 specific categories of items to be seized. The Ninth Circuit's conclusion that the agents in *Center Art Galleries* could not have relied on the warrant in that case accordingly does not conflict with the Fifth Circuit's conclusion that the agents in this case acted in objectively reasonable reliance on the search warrant here.

4. Petitioner also argues extensively (Pet. 11-17, 19-25) that the warrant in this case was in fact invalid under the Fourth Amendment, either because it lacked

particularity[4] or because it lacked probable cause.[5] The court of appeals, however, did not reach any question

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[4] Petitioner's major challenge (Pet. 19-25) to the particularity of the warrant is that it authorized a seizure of all of his business records in a search to be conducted at his house. Petitioner cites no case, however, in which a court of appeals has held that an "all records" search—even one conducted in a house—could never be constitutionally justified. To the contrary, even the decisions cited by petitioner accept that, where a business is permeated with fraud, essentially all of the records of the business potentially contain evidence of the crime and are thus subject to seizure. Moreover, it was petitioner who decided to conduct his fraudulent businesses in his house and who decided that the electricity account for the house should be listed in the name of one of his fraudulent businesses. In those circumstances, an all-records search of petitioner's house was appropriate.

[5] Petitioner's major challenge to the existence of probable cause to conduct a broad search for his business records centers (Pet. 23) on language in the affidavit showing that the charities he ran did, in fact, make some donations to benefit hospitalized children and veterans. The theory of fraud in this case, however, was not that the charities had made *no* donations to the causes they purported to support. Instead, the theory of fraud was that they fraudulently raised money by making specific false representations that most of the money raised would be used for the specified charitable purposes. See, *e.g.*, Pet. App. 41a ("majority of funds donated are used for charitable purposes"); *id.* at 43a ("20% of the funds raised would go to cover administrative costs"). The fact that a tiny percentage of the amount raised (for example, one-tenth of one percent of AVRF's income for the year ended January 31, 1996, was used for charitable purposes, see Pet. App. 11a) does not detract from the conclusion that there was probable cause to believe that petitioner's charities had engaged in fraud.

Relying on *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 792-793 (1988), petitioner also challenges (Pet. 25) the affidavit's assertion that the payments that were made to telemarketing companies for their fundraising services constituted evidence of the fraud. In *Riley*, the Court struck down on First Amendment grounds a state statute prohibiting professional

regarding the validity of the warrant. Instead, the court decided the case solely on the ground that, even if the warrant were invalid, the evidence seized would be admissible pursuant to the *Leon* good-faith exception to the exclusionary rule. This Court ordinarily does not grant review to consider questions that were not decided by the court of appeals. Moreover, because the court of appeals did not rule on the substantive validity of the warrant, its decision could not conflict with any of the various decisions cited by petitioner for the proposition that the warrant was invalid.[6] Finally, further

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fundraisers from retaining an "unreasonable" or "excessive" fee and defining a fee of 35% as presumptively unreasonable. In so ruling, the Court observed that "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." 487 U.S. at 793. As the Court observed in *Riley*, however, the government could achieve the objective of reducing donor misperception by more narrowly tailored means, such as "vigorously enforc[ing] its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." *Id.* at 800. That is precisely what was done here.

[6] Petitioner argues that the "including, but not limited to" language in the warrant rendered it overbroad. It is settled, however, that the inclusion of such language in a warrant will not be construed so as to defeat the particularity of the main body of the warrant. Thus, in *Andresen* v. *Maryland*, 427 U.S. 463 (1976), the warrant gave a list of specific items to be seized, followed by the phrase "other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* at 479. The Court held that the warrant was not impermissibly general. *Id.* at 480-481. See *United States* v. *Willey*, 57 F.3d 1374, 1390 (5th Cir. 1995), cert. denied, 516 U.S. 1029 (1995); *United States* v. *Robertson*, 21 F.3d 1030, 1033-1034 (10th Cir.), cert. denied, 513 U.S. 891 (1994); *United States* v. *Frederickson*, 846 F.2d 517, 520 (8th Cir. 1988); *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980) ("We read *Andresen* to mean that the 'general' tail of the search warrant will be construed

review would not in any event be warranted to consider the question whether the particular warrant in this case did or did not satisfy constitutional standards of particularity or probable cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

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so as not to defeat the 'particularity' of the main body of the warrant."). Indeed, courts routinely reject overbreadth challenges to warrants containing the "including, but not limited to" language. See *United States* v. *Blakeney*, 942 F.2d 1001, 1026-1027 (6th Cir.), cert. denied, 502 U.S. 1035 (1991); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1567-1568 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); *United States* v. *Krasaway*, 881 F.2d 550, 551-553 & n.2 (8th Cir. 1989); *United States* v. *McLaughlin*, 851 F.2d 283, 285-286 (9th Cir. 1988); *United States* v. *Fannin*, 817 F.2d 1379, 1381-1383 (9th Cir. 1987); *United States* v. *Washington*, 797 F.2d 1461, 1472 (9th Cir. 1986).

Supreme Court, U.S.
FILED
MAR 17 2000
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(3)

No. 99-971

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN CHERNA
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Marvin Cherna files the following Reply Brief in response to the "Brief in Opposition of the United States."

Preliminary Statement:

At the outset, Petitioner notes that the Government misperceives the nature of his challenge to the Warrant. It characterizes Petitioner's challenge in a limiting way: "Petitioner's major challenge (Pet. 19-25) to the particularity of the warrant is that it authorized a seizure of all of his *business records* in a search to be conducted at his house." *Resp.*, p. 15 n. 4 (emphasis added). Not true. Petitioner submits that the Warrant allowed agents of the federal government to search for and seize *any tangible item* located on the premises that served as his residence/place of business. This Warrant literally imposed no limits on the seizure of any tangible item, whether business or personal. That is Petitioner's claim.

The McGrew Conflict:

In *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), the Ninth Circuit concluded that an affidavit that was not served with the warrant could not be used to cure a particularity defect on the face of the warrant and that the good faith exception could not, as a matter of law, shield the fruits of the search from suppression. Petitioner contends that the Fifth Circuit's resolution of his case is in direct conflict with *McGrew* for several reasons:

1. In both cases, the Government attempted to rely on an affidavit tendered in support of the issuance of a search warrant to establish the warrant's particularity;
2. In both cases, the affidavit was referenced in the body of the warrant, but was not attached to the warrant;
3. In both cases, the person who resided at the target premises was never served with or shown a copy of the affidavit because the affidavit was under seal; and

4. In both cases, the Government urged the Court to salvage the fruits of the search and seizure by invoking the good faith exception to the exclusionary rule.

The Government sees no conflict with *McGrew*. *Resp.*, pp. 9-11. In its efforts to distinguish *McGrew*, the Government advances several arguments that are simply incorrect. First, contrary to the Government's unsupported assertion, there is no evidence that the Smitherman Affidavit was ever "attached to the Warrant." *Resp.*, p. 10. All of the testimony in the record is exactly to the contrary. The Smitherman Affidavit was separately sealed and was neither attached to nor served with the Warrant. Indeed, while the Warrant does refer to the Smitherman Affidavit, it does not expressly incorporate it by reference or otherwise indicate that physical attachment was even contemplated. *App. D, p. 33a.*

Second, the Government concludes that the *McGrew* case is different because the Court in that case premised its rejection of the good faith exception to the exclusionary rule "in substantial part" on the fact that the Ninth Circuit adheres to a rule requiring actual physical attachment of the affidavit to the warrant as a prerequisite to allowing the affidavit to cure a particularity defect. *Resp.*, p. 11 (emphasis added). To the contrary, the *McGrew* Court clearly stated that it was applying the "accompanying" test – not the physical attachment test:

> "The well settled law of this circuit states that a 'search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) *the affidavit accompanies the warrant*, and . . ." *McGrew*, 122 F.3d at p. 849 (emphasis added).[1]

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[1] Footnote 5 of the *McGrew* opinion does refer to actual "attachment" of the affidavit to the warrant. The apparent

It reiterated its reliance on the "accompanied" standard at a later point in the opinion: "If the 'incorporated' affidavit does not *accompany* the warrant, agents cannot claim good faith reliance on the affidavit's contents." *McGrew*, 122 F.3d at p. 850 (emphasis added). Thus, the result in *McGrew* is clearly not attributable solely to a nuance in Ninth Circuit law.[2]

Third, the Government suggests that the *McGrew* Court attached some significance to the fact that there was no evidence that the agents who participated in the search were "aware of the contents of the affidavit." *Resp.*, pp. 9-10. To the contrary, the pivotal issue was not whether the agents themselves were aware of the contents of the curative affidavit, but, instead, whether the owner of the target residence had received a copy of the affidavit:

> "The agents must either serve the affidavit with the warrant or list with particularity its relevant

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inconsistency between the footnote and the text simply reflects the fact that the Ninth Circuit has been as erratic as the Fifth in its treatment of when an affidavit can be used to cure a warrant's lack of particularity. Some Ninth Circuit cases suggest that physical attachment is required. *Center Art Galleries – Hawaii v. United States*, 875 F.2d 747 (9th Cir. 1989); *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1989). Others hold that physical attachment is unnecessary if the affidavit accompanies the warrant. *See, e.g. United States v. Barkacs*, No. 90-10240 (9th Cir. 9/22/99 – unpublished); United *States v. Towne*, 997 F.2d 537 (9th Cir. 1993); *In re Matter of Seizure of Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1318-19 (9th Cir. 1981).

[2] Even if the different results in *McGrew* and *Cherna* could be explained solely by referencing the different requirements in each Circuit for relying on an affidavit to cure a lack of particularity, why should this Court condone different rules in different Circuits? After all, Texas citizens are protected by the same Fourth Amendment that protects citizens of California.

> directives on the warrant itself. Otherwise, the good faith exception is not available because . . . *no matter how aware the officers are of the limits of their search*, the person being searched . . . is still completely unaided when agents fail to produce a document explaining the parameters of the search." 122 F.3d at 850, n. 5 (emphasis added).

Fourth, the Government finds a distinction in the fact that the *McGrew* warrant made no reference to the type of criminal activity suspected or to the type of items the officers were authorized to seize. *Resp., p. 9.* However, all that the Warrant in the case *sub judice* explained about the nature of the crime was that it somehow involved mail fraud or wire fraud as allegedly described in the Smitherman Affidavit. A warrant's conclusory reference to the crimes of mail fraud and wire fraud adds nothing to its particularity. After all, the federal statutes criminalizing mail fraud and wire fraud encompass any "scheme or artifice to defraud." Thus, their scope is as broad as the imagination of those who perpetrate scams and swindles. *See, e.g., McNally v. United States*, 483 U.S. 350, (1987); *Durland v. United States*, 161 U.S. 306, (1896).

It is telling that the Government itself points to the Smitherman Affidavit as the document that defines the crimes under investigation. *Resp.*, p. 10, n. 1. In essence, the Government concedes that, just as in *McGrew*, the nature of the criminal scheme the Government purported to investigate under the Warrant is revealed only through resort to the missing Smitherman Affidavit.[3]

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[3] There is one distinction between this case and *McGrew*, but that distinction makes the case for suppression here even more compelling than in *McGrew*. In *McGrew*, the affidavit apparently did describe the suspected crime and the items subject to seizure. Here, in contrast, even if the Smitherman Affidavit had been attached to and incorporated into the Warrant, it would not have restricted either the scope of the search or the items subject to

Finally, the Government attempts to distinguish the Warrant here from the one declared invalid in *McGrew* on the ground that this Warrant listed 26 categories of items that were subject to seizure if the executing officers concluded that they "related" to the mail and wire fraud offenses described in the missing Smitherman Affidavit. *Resp.*, p. 10. In advancing this argument, the Government asks the Court to ignore two significant features of the Warrant. First, as described in the Petition, the 26 "specific categories" that the Government relies on are, in fact, far from "specific." Indeed, the Fifth Circuit itself – writing only one year before Cherna's case was decided – condemned as unconstitutional a warrant containing more narrowly-tailored categories than the 26 categories listed in the Warrant here. *United States v. Shugart*, 117 F.3d 838, 844 (5th Cir. 1997).[4]

Second, the Government asks the Court to ignore the broad all encompassing language - "including, but not limited to" – that precedes the 26 categories. It concludes that *Andresen v. Maryland*, 427 U.S. 463 (1976) and its progeny stand for the proposition that such language does not render the Warrant a general warrant. That, however, is not what *Andresen* says. In *Andresen*, the catch-all language in the warrant appeared *after* a specific laundry list of items. The Court simply applied a standard rule of construction to conclude that the scope of the general language appearing at the tail end of the laundry list was

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seizure. *Pet., pp. 2-3.* Quite simply, the Smitherman Affidavit did not supply particularity at all. Indeed, the Smitherman Affidavit revealed that all items located on the target premises would be subject to seizure.

[4] Thus, the Fifth Circuit's own *Shugart* precedent would have alerted any objectively reasonable government official involved in the preparation of the Warrant that the final product was, in fact, an unconstitutional general Warrant.

circumscribed by the specific categories that appeared before it. Here, in contrast, the catch-all language *precedes* the laundry list and specifically recites that the list is not to be construed as limiting. Thus, this case is the converse of *Andresen*.

Other Conflicts:

The Government ignores the direct conflict among the Circuits over the question whether an affidavit must be physically attached to the warrant before it is permitted to supply constitutionally-mandated particularity. As described in the Petition, the Circuits are in disarray over this issue – there are stark inter- and intra- Circuit conflicts on what is required before an affidavit may cure a particularity defect. *Pet.*, pp. 15-17.

Citing the Fifth Circuit's reliance on the good faith exception, the Government pretends that there are no conflicts for the Court to resolve:

> "Moreover, because the Court of Appeals did not rule on the substantive validity of the warrant, its decision could not conflict with any of the various decisions cited by Petitioner for the proposition that the warrant was invalid." *Resp.*, p.16 (emphasis added).[5]

In *United States v. Leon*, 468 U.S. 897 (1984) this Court expressed the view that the good faith exception would not "deny needed guidance from the courts, or freeze Fourth Amendment law in its present state." 468 U.S. at 924. As indicated by the above-

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[5] Petitioner respectfully submits that the Government's avoidance analysis inevitably leads to the conclusion that this Court should countenance the application of different constitutional standards to citizens in states located in different Circuits. This type of thinking flies in the face of the accepted principle that the Constitution acts directly on every citizen regardless of state citizenship or geographical location.

quoted passage, however, the Government urges the Court to invoke the good faith exception to avoid resolving important issues of Fourth Amendment jurisprudence. Thus, the Government urges the Court to bypass the important question whether an all records (or, in this case, all tangible items) warrant is consistent with the Fourth Amendment and, if so, the proper standard of probable cause required to support the issuance of such a warrant. Likewise, the Government uses the good faith rationale to urge the Court to avoid delving into the clear inter- and intra- Circuit conflicts over the question whether an affidavit that is not attached to a warrant can supply constitutionally-mandated particularity. *Resp.*, pp. 14-15.

Given the exceptions to the "good faith" rule that this Court recognized in *Leon*, it is difficult to understand how any court can resolve the "good faith" issue without addressing the constitutional validity of the warrant itself where, as in this case, the warrant under scrutiny is facially invalid.[6] Petitioner respectfully submits that the Court should not accept the Government's invitation to leave Fourth Amendment jurisprudence in disarray simply because

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[6] This case, however, illustrates that the good faith exception can be utilized to mask or defer the resolution of serious conflicts over Fourth Amendment principles. Here, the Fifth Circuit cited its own intra-Circuit conflict over the question whether a supporting affidavit must be physically attached to a search warrant before it can supply particularity as a basis for concluding that the officers acted in good faith. *United States v. Cherna*, 184 F.3d 403, 412-413 (5th Cir. 1999). Importantly, although it expressly acknowledged that its own cases were in conflict, the Fifth Circuit failed to resolve that conflict. This, of course, means that law enforcement officials in the Fifth Circuit are free to choose the Fourth Amendment rule that they prefer to follow, knowing that courts within the Circuit will refuse to suppress by using the unresolved intra-Circuit conflict to support a claim of good faith.

some of the issues relating to the validity of the Warrant were addressed by the lower courts in the context of good faith.

The Lo-Ji Sales Exception:

Petitioner adheres to his contention that the rule in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) is applicable here, and that the good faith exception to the exclusionary rule is therefore inapplicable. The Fourth Amendment demands that a neutral and detached magistrate stand between the police and the target of the search Warrant. The magistrate's function is to determine the existence of probable cause and to ensure that the scope of the requested search is sufficiently particularized as mandated by the language of the Fourth Amendment. The probable cause and particularity requirements are interrelated, for probable cause is necessarily determined in relation to the items that the government seeks authority to seize. *Infra,* p. 9.

Where, as in this case, a magistrate issues a blank check to the authorities allowing the latter to roam at will throughout the target residence, and to seize whatever they unilaterally determine to be "related to" the amorphous crimes of mail fraud and wire fraud, then it is clear that the magistrate has not performed the function assigned to him by the Constitution. A magistrate who cedes to the executing officers the authority to determine the scope of their search and seizure has just as completely relinquished his constitutional role as the magistrate in *Lo-Ji Sales*.

Probable Cause:

For the most part, the Government avoids addressing the important question of the standard of probable cause that must be satisfied to justify the issuance of an all records (or all items) search warrant. Instead, it invites the Court to sidestep that important issue, arguing that the Fifth Circuit's ruling is premised solely on the good faith exception, and, therefore, the Court should not delve into substantive Fourth Amendment issues like probable cause. *Resp.*, pp. 15-16. For the reasons described above, the Government's rationale has the Court ceding control of the

development of substantive Fourth Amendment jurisprudence to the lower federal courts, and should be rejected on that ground alone.

More importantly, a palpable lack of probable cause is one of the four circumstances the Court specifically identified in *Leon* where the exclusionary rule would continue to operate. Thus, the evident absence of probable cause is always an appropriate consideration - even where the sole question is one of good faith. Indeed, contrary to what the Government implies, the Fifth Circuit specifically addressed probable cause in the course of conducting its good faith analysis. *App. A, pp. 9a-12a.* Thus, the issue is certainly before the Court.

The Government's only direct response to Petitioner's argument that probable cause to support issuance of an all records warrant was never established is contained in footnote 5 of its Response. There, the Government asserts that the Smitherman Affidavit supplied "probable cause to believe that petitioner's charities had engaged in fraud." *Resp., p. 15, n. 5.* Clearly, the Government has misconstrued the probable cause issue. The issue is not whether there might have been probable cause to support a limited, particularized search for evidence of fraud. The question Petitioner raises is whether anything in the Smitherman Affidavit established probable cause for the issuance of an unlimited all records warrant that literally authorized the executing agents to seize any tangible item located on the premises which served as Petitioner's residence/place of business.

This Court has explained that the determination of probable cause in the context of a search warrant centers on two questions: (i) whether "there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought"; and (ii) whether "the items will be found in the place to be searched." *Zurcher v. Stanford Daily, 436 U.S. 547, 556–557, n. 6 (1978); see also, Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297, 1301 (1999).* Petitioner notes that this Court has never addressed whether an all records/all items warrant is constitutional and, if so, the standard of probable cause that must

be satisfied to justify the issuance of such a warrant. Petitioner contends that such all-encompassing warrants directed at a person's residence should, if constitutional at all, at the very least require a more substantial showing than the one Agent Smitherman made in this case. To allow the unrestrained invasion of an individual citizen's home and the seizure of all of his business and personal effects on the basis of the Smitherman Affidavit flies in the face of the values that the Fourth Amendment was designed to protect. The wholesale abandonment of those values by the Fifth Circuit should not be countenanced by this Court.

Sheppard:

In its discussion of *Massachusetts v. Sheppard*, 468 U.S. 981(1984), the Government claims that Petitioner mischaracterized Agent Smitherman's testimony. *Resp.*, p. 13. To the contrary, Petitioner quoted it. *Pet.*, pp 27-28. No objective reading of the transcript of the suppression hearing (whether in whole or in part) would lead the reader to conclude that Agent Smitherman acted in anything but a deliberate manner in securing the general warrant that is at the heart of this case.

CONCLUSION

The Warrant here was an obvious unconstitutional general warrant. The Fifth Circuit's conclusion that the officers who secured and executed the Warrant acted in objective good faith conflicts with the Ninth Circuit's reasoning in *McGrew* and, more importantly, represents a complete abandonment of the principles at the core of the Fourth Amendment. For these reasons and the other reasons set out above and in his Petition for a Writ of Certiorari, Petitioner respectfully requests that the Court issue a writ of certiorari to resolve the important issues of constitutional law that this case presents.

March 16, 2000.